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Supreme Court, U.S.
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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UTAH POWER & LIGHT COMPANY,
Appellant

v.

IDAHO PUBLIC UTILITIES COMMISSION,
UNITED STATES DEPARTMENT OF ENERGY, and
IDAHO POWER COMPANY,
Appellees

On Appeal from the Supreme Court of Idaho

JURISDICTIONAL STATEMENT

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April 15, 1987

QUESTIONS PRESENTED

1. Should the Idaho Supreme Court be reversed for having affirmed the order of the Idaho Public Utilities Commission authorizing Idaho Power Company, an investor-owned utility, to have the right solely to serve the United States Department of Energy by delivery of transmission level power and energy to the Idaho National Engineering Laboratory within the service area covered by a certificate of public convenience and necessity held by Utah Power & Light Company, an investor-owned utility, with the result that Utah Power & Light Company has been deprived of its property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and with the further result that the decision will promote throughout the United States uncertainty, controversy, and vexatious litigation with the said Department of Energy and others concerning the status and rights of investor-owned utilities under certificates of public convenience and necessity?

2. Should the Idaho Supreme Court be reversed for having affirmed the order of the Idaho Public Utilities Commission authorizing Idaho Power Company, an investor-owned utility, to have the right solely to serve the United States Department of Energy by delivery of transmission level power and energy to the Idaho National Engineering Laboratory within the service area covered by a certificate of public convenience and necessity held by Utah Power & Light Company, an investor-owner utility, with the result that Utah Power & Light Company has been deprived of its property without notice and an opportunity to be heard in violation of the Fifth and Fourteenth Amendments to the United States Constitution and with the further result that the decision will promote throughout the United States uncertainty, controversy, and vexatious litigation with the said De-

partment of Energy and others concerning the status and rights of investor-owned utilities under certificates of public convenience and necessity?

RULE 28.1 LIST

Energy National, Inc., a Utah corporation, is a wholly-owned subsidiary of Appellant Utah Power & Light Company. Appellant has no parent companies or other subsidiaries or affiliates to list pursuant to Rule 28.1.

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IN THE

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UTAH POWER & LIGHT COMPANY,
Appellant

v.

IDAHO PUBLIC UTILITIES COMMISSION,
UNITED STATES DEPARTMENT OF ENERGY, and
IDAHO POWER COMPANY,
Appellees

On Appeal from the Supreme Court of Idaho

JURISDICTIONAL STATEMENT

Appellant Utah Power & Light Company ("Utah Power" or "UP&L"), an electric utility operating in Idaho, Utah, and Wyoming, appeals from the final judgment of the Supreme Court of Idaho ("Idaho Court"), entered on November 26, 1986, as 1986 Opinion No. 154 and the order of the Idaho Court and Remittitur issued thereon, each dated January 16, 1987, denying Utah Power's Petition for Rehearing, which affirmed Order No. 20136 of the Idaho Public Utilities Commission (the "IPUC") dated November 27, 1985, with Service Date of November 29, 1985, in Case No. U-1500-157 (the "IPUC Order"), granting Appellee Idaho Power Company ("Idaho Power" or "IPC") the right solely to serve the United States Department of Energy ("DOE") by delivery of transmission level power and energy to the Idaho National Engineering Laboratory ("INEL") in Utah Power's state-certified service territory.

OPINIONS BELOW

The opinion (including the dissenting opinion) of the Idaho Court (the "Opinion"), which appears in the Appendix, pp. 1a through 25a, *infra*, is reported at 86 Idaho 2499 (Adv. Sh.), 730 P.2d 930 (1986). The order of the Idaho Court dated January 16, 1987, denying Utah Power's Petition for Rehearing (the "Rehearing Order"), and the Remittitur issued thereon, are not reported. The Rehearing Order and Remittitur are reprinted in the Appendix, pp. 26a through 29a, *infra*. The IPUC Order is not reported, but is reprinted in the Appendix, pp. 30a through 56a, *infra*. The order of the IPUC denying Utah Power's Petition for Reconsideration is not reported, but is reprinted in the Appendix, pp. 57a through 60a, *infra*.

JURISDICTION

This is an appeal from the final judgment of the Supreme Court of Idaho where is drawn into question the validity of an order of the IPUC on the ground of its being repugnant to the Fifth and Fourteenth Amendments to the United States Constitution, the Idaho Court having found in favor of its validity. The judgment of the Idaho Court affirming the IPUC Order was entered on November 26, 1986. *See* Appendix, p. 1a, *infra*. Appellant's Petition for Rehearing was timely filed on December 16, 1986, and was denied and Remittitur issued by the Idaho Court on January 16, 1987. *See* Appendix, pp. 26a through 29a, *infra*.

A Notice of Appeal to this Court was timely filed in the Idaho Court (which has the record on the date hereof) on April 13, 1987. A copy of this Notice of Appeal is included in the Appendix at pp. 61a through 64a, *infra*.

This appeal is being docketed in this Court within 90 days from the denial of rehearing by the Idaho Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). State public utilities commission orders issued under delegated authority are "state statutes" for pur-

poses of 28 U.S.C. § 1257(2). *E.g., Atchison, Topeka & Santa Fe Railway Co. v. Public Utility Commission*, 346 U.S. 358 (1953); *Lake Erie & Western Railroad Co. v. Public Utilities Commission*, 249 U.S. 422, 424 (1919); *Williams v. Bruffy*, 96 U.S. 176, 183 (1878) (under predecessor statute).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

The pertinent provisions of the Idaho Public Utility Act, §§ 61-526 and 61-528 *Idaho Code*, are reprinted in the Appendix at pp. 65a through 66a, *infra*.

STATEMENT OF THE CASE

A. Facts Material to Consideration of the Questions Presented.

Appellant Utah Power is an investor-owned electric company which provides electric utility service in Idaho, Utah, and Wyoming. Appellee Idaho Power is also an investor-owned electric utility company, which provides electric utility services in Southern Idaho and parts of Oregon and Nevada. Appellee DOE [1] operates the Idaho

[1] The DOE was alternatively referred to throughout the proceedings before the IPUC and the Idaho Court as the Department of Energy ("DOE") and its predecessors, the Atomic Energy Commission ("AEC") and the U.S. Navy. The Idaho National Engineering Laboratory ("INEL") was sometimes referred to by

National Engineering Laboratory ("INEL"), located in five adjacent counties in Idaho, including Butte County, the latter county being the location of the delivery point for the electric utility services in question.

In January 1985, DOE filed a petition for declaratory ruling with the IPUC requesting it to determine that upon termination of the existing contract (described below) among DOE, Utah Power, and Idaho Power for electric service to the INEL, Idaho Power, rather than Utah Power, would have the right solely to provide electric utility service to the INEL under the public utility laws of Idaho. Idaho Power and Utah Power appeared in the proceeding as respondents. Utah Power asserted its exclusive right to provide electric utility service to the INEL facility pursuant to a certificate of convenience and necessity (the "Utah Power Certificate") obtained by it from the IPUC on March 21, 1929, pursuant to which it was authorized to construct, maintain, and operate a general electrical system to provide electric utility service in Butte County, Idaho. The Utah Power Certificate is included in the Appendix at pp. 72a through 75a.[2]

Utah Power provided electric utility service within Butte County continuously from the date of the Utah Power Certificate. In 1943, it commenced serving the

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the name of its predecessors, the National Reactor Testing Station ("NRTS"), the Energy Research and Development Administration ("ERDA"), or the Naval Proving Grounds. Unless the context otherwise indicates, references herein to the DOE and the INEL include these predecessors.

[2] In addition to this certificate of convenience and necessity, Utah Power obtained certificates of public convenience and necessity for the other four counties in which the INEL is located and, on April 1, 1929, obtained from Butte County a franchise (the "Butte County Franchise"), to "erect, construct, maintain, and operate within the County" a system to provide electric utility service. Utah Power's certificates predate the certificates obtained by Idaho Power for each of the counties in which the INEL is located.

area now known as the Idaho National Engineering Laboratory by extending service from near Arco, Idaho to the U.S. Navy at the Naval Proving Grounds (predecessor to DOE at the INEL site) at a delivery point located in Butte County. In 1949, Utah Power entered into an electric supply contract with the AEC (predecessor to DOE), to assure continued electrical supply to the site after the U.S. Navy ended its work at the Naval Proving Grounds. This contract designated a Butte County delivery point.

In 1950, the AEC, Utah Power, and Idaho Power entered into a three party agreement (the "Three Party Agreement") under which Utah Power and Idaho Power agreed jointly to provide electric utility service to the INEL. Under a related agreement between the two utilities, Idaho Power agreed to deliver its power to Utah Power at American Falls, Pocatello, Blackfoot, and Goshen, Idaho, for subsequent delivery by Utah Power to the INEL at the DOE's Scoville substation in Butte County. In accordance with the requirements of the Three Party Agreement, Utah Power constructed a 132 Kv transmission line from its Goshen substation to the Scoville substation. This line provided the sole service connection for the supply of electrical power to the INEL between 1950 and 1970. At the time these agreements were made Utah Power had the only certificate of public convenience and necessity from the IPUC and the only Butte County franchise to provide electric service to customers in Butte County. Idaho Power had no such certificate or franchise and participated solely on the basis of the above-mentioned agreements. The parties operated under these agreements essentially without change from 1950 to 1970, except that, in 1957, the Three Party Agreement was modified to double the power supply obligations of Idaho Power and Utah Power to the INEL.

In 1970, a 230 Kv, interstate interconnection line was built by Utah Power, Idaho Power, and Montana Power

Company, from the vicinity of Anaconda, Montana to Idaho Power's Brady substation, American Falls, Idaho, which traversed the INEL site. Each of these three companies constructed a portion of the interconnect line, known as the "Associated Mountain Power System" ("AMPS") line, with Idaho Power constructing the southern portion between the Brady substation and a newly-constructed substation, the Antelope substation, built by Utah Power in conjunction with the AMPS line and located on the INEL site in Butte County, one-half mile east of the DOE's Scoville substation. The AMPS line was built to provide additional interconnection capacity among the three utilities, to reduce their individual reserve capacity requirements. To increase reliability, Utah Power, at DOE's request, constructed another 138 Kv line out of the Antelope substation to the Scoville substation. These lines continued to be connected with Utah Power's Goshen substation and through Utah Power's Goshen-Antelope-Scoville line provided the same source and delivery of power to DOE as had existed since the original date of the Three Party Agreement in 1950. Since the construction of the AMPS line, Idaho Power has continued to deliver electrical power for the INEL facility to Utah Power at Pocatello, Blackfoot, American Falls, and Goshen, Idaho, for delivery by Utah Power, through Utah Power's Goshen-Antelope-Scoville facilities, to the DOE at the Scoville substation.

Idaho Power's section of the AMPS line was constructed partially in Butte County. In order to participate in constructing the AMPS line, Idaho Power was required to obtain a certificate of convenience and necessity from the IPUC, which it obtained in 1969, designating the metes and bounds description along which Idaho Power's portion of the AMPS line was to be constructed.[3]

[3] The record does not show that Idaho Power ever applied for or obtained a franchise for electrical facilities or services from Butte County.

This certificate, as amended, was designated as "Amended Certificate No. 268" and is referred to herein as the "Idaho Power Certificate". It is included in the Appendix at pp. 53a through 56a, *infra*. The application filed by Idaho Power to obtain this certificate (the "Idaho Power Application") is included in the Appendix at pp. 76a through 81a. The Idaho Power Certificate underlies the IPUC Order, the majority opinion of the Idaho Court, and this appeal.

The Idaho Power Application stated that a certificate of public convenience and necessity was needed to allow Idaho Power to participate in the construction of the AMPS line and that such certificate would facilitate interconnection among the utilities, would provide operating economies, and would enhance the reliability of their respective systems. The Idaho Power Application further stated:

> V
>
> Applicant states that it has previously obtained and now has certificates of convenience and necessity for general electric service in Power and Bingham Counties, *but it does not have any certificate of convenience and necessity for Butte County, Idaho.*
>
> VI
>
> That said transmission line will be constructed and operate at a nominal voltage of 269,000 volts, *and the same will not be available for, or dedicated to, the furnishing of general service along its route, and the construction of this transmission line will not compete with any other public utility, corporation or person.*
>
> . . . .
>
> VIII
>
> That the public convenience and necessity will be served by, and require, and will continue to require, the construction and operation of the aforedescribed

> *transmission lines*, including the portion thereof to be owned and operated by Idaho Power Company . . . .
>
> IX
>
> WHEREFORE, Idaho Power Company requests that the Idaho Public Utilities Commission grant the company a certificate . . .; and that said certificate of convenience and necessity be limited to the transmission, interchange and supply of high-voltage electric power and energy *as herein set forth.*

Idaho Power Application, Appendix, pp. 76a through 81a, *infra* (emphasis added).

The Idaho Power Certificate and the Idaho Power Application both state in their titles:

> In the Matter of the Application of Idaho Power Company for a Certificate of Public Convenience and Necessity (*For Transmission Line Only*) in Power, Bingham and Butte Counties in the State of Idaho.

Idaho Power Certificate, Appendix, pp. 53a through 56a, *infra*, Idaho Power Application, Appendix, p. 76a, *infra* (emphasis added).

Following the issuance of the Idaho Power Certificate, Utah Power, Idaho Power, and the DOE continued to operate under the Three Party Agreement just as they had done during the nineteen years preceding the issuance of the Idaho Power Certificate. During this time, Idaho Power never asserted that it had the right to serve the DOE or any other customer in Butte County, except for the service it provided to the DOE pursuant to the Three Party Agreement. Nor did the DOE ever, until it terminated the Three Party Agreement on October 31, 1986, following the issuance of the IPUC Order, obtain electric service from Idaho Power other than pursuant to the Three Party Agreement. Nor has any claim ever been made by the DOE, the IPUC, or any other party that Utah Power's service or ability to provide service to DOE or others in Butte County is or has been

or would be unsatisfactory. Furthermore, the IPUC has never determined that Utah Power's rates with respect to the INEL facility are not just and reasonable. It is undisputed that Utah Power has been and remains ready, willing, and able to provide all or any part of the electric utility service required by the DOE for the INEL facility.

On November 29, 1985, the IPUC issued the IPUC Order declaring that if the DOE should terminate the Three Party Agreement, Idaho Power would have the authority to provide the entire electrical service requirements of the DOE. The IPUC ruled that Idaho Power was certified pursuant to the Idaho Power Certificate to serve the DOE at the INEL in Butte County at transmission levels. This ruling was based on the IPUC's conclusion that the Idaho Power Certificate is valid and that Idaho Power "is currently serving the entire DOE load." Appendix, p. 49a, *infra*. The Idaho Court affirmed the IPUC Order insofar as it authorized Idaho Power solely to serve the DOE at the INEL facility.

B. How The Federal Questions Were Raised.

Included in the Appendix at pp. 67a through 71a, *infra*, are excerpts from Utah Power's Petition for Reconsideration to the IPUC dated December 16, 1985, its Appellant's Brief in the Idaho Court dated June 10, 1986, and its Brief in Support of its Petition for Rehearing to the Idaho Court filed December 30, 1986, in which Utah Power's claims under the United States Constitution were raised. Before the IPUC, Utah Power claimed that the IPUC Order results in a confiscation of its property (that is, its certificate of convenience and necessity to provide electric service in the relevant service area in Butte County, Idaho), in violation of due process of law.[4] Be-

[4] See excerpts from Utah Power's Petition for Reconsideration to the IPUC, Appendix, p. 67a, *infra*.

fore the Idaho Court, Utah Power claimed that the IPUC Order deprives it of this property without procedural or substantive due process of law in violation of the United States Constitution.[5] These constitutional claims were considered and rejected by the IPUC in its order denying Utah Power's Petition for Reconsideration and by the Idaho Court in its opinion dated November 26, 1986, and again in its Rehearing Order dated January 16, 1987, denying Utah Power's Petition for Rehearing.[6]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. Service Area Rights Obtained Under Certificates of Public Convenience and Necessity Are Essential to the Maintenance of Regulated Public Utilities Throughout the United States.

The right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution is a fundamental right of each citizen, the deprivation or erosion of which is a matter of substance with respect to which the courts, and this Court as the forum of last resort, provide the ultimate source of individual protection.

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[5] Utah Power's Appellant's Brief in the Idaho Court, Appendix, pp. 68a through 69a and its Brief on Rehearing, Appendix, pp. 70a through 71a, *infra*. These procedural and substantive federal due process issues also were raised by counsel for Utah Power and the Appellees and by the Idaho Court during oral argument prior to the issuance of the Opinion.

[6] In the IPUC Order denying Utah Power's Petition for Reconsideration, Appendix, pp. 57a through 60a, *infra*, the IPUC denied the petition after a "careful review." The dissenting opinion of Idaho Supreme Court Justice Bakes thoroughly discussed Utah Power's U.S. Constitutional claims. *See* Appendix, pp. 11a through 25a, *infra*. Justice Bakes' dissenting opinion was expressly referred to and rejected in the Idaho Court's majority opinion. *See* Appendix, p. 10a n.1, *infra*. The Idaho Court denied Utah Power's Petition for Rehearing "after due consideration." Appendix, p. 26a, *infra*.

The decision appealed from in this case constitutes a substantial denial of Utah Power's due process rights and will promote uncertainty, controversy, and vexatious litigation in the United States concerning the status and rights of investor-owned utilities under certificates of public convenience and necessity or equivalent state and local government grants of the right to own and operate utilities in designated areas.

Electric energy in the United States is provided primarily by investor-owned utilities which finance the construction of generation, transmission, and distribution facilities with investor-supplied funds. Because of the enormous investments of capital required for these facilities, the duplication of which by others would be wasteful, prohibitive, and contrary to the public interest, electric utilities operate throughout the country within service areas prescribed to them by various regulatory agencies.

Utilities enjoy an essential monopoly within these service areas, in return for which they subject themselves to regulation by regulatory bodies, which, in general, have the power to regulate a wide range of the utilities' activities. These include the quantity and quality of service they must and can provide, the approval of the rates which the utilities can charge, the facilities they must and can acquire and provide, the amount and type of indebtedness they can incur and securities they can issue, the maintenance of uniform systems of accounts, the filing of periodic reports, and other matters. In addition, the utilities are required by law to provide an adequate and reliable supply of electricity on demand. *See, e.g., Idaho Power & Light Co. v. Blomquist*, 141 P. 1083 (Idaho 1914).

The protected position given to the utilities within their service areas promotes investor confidence and the ability of the utilities to finance their capital requirements. Conversely, the regulatory control over the kinds and amount of revenues the utility can earn through its authorized

rates keeps the rate of return to investors at modest levels compared to non-protected industries. Thus, the system is one which balances relatively lower investment yields against the reduced risks achieved by the protected position in the utility's service area. Investor funds are available only if the utilities offer investors an opportunity to earn a return which is commensurate with the risk undertaken. Utility regulation requires the investor to forego the opportunity for higher yields available in non-regulated enterprises in exchange for greater protection against losses. Without this reduced risk, utility investors would require higher returns. This, in turn, would prevent utilities from obtaining low-cost capital to build the facilities needed to provide adequate and reliable electrical service.

This regulatory concept has been described by Dr. Alfred H. Kahn, former chairman of the Civil Aeronautics Board and of the New York Public Service Commission, who has stated that:

> The essential basis of public-utility regulation is an implicit bargain between consumers and investors that, *in exchange for a monopoly franchise*, the company accepts the strict legal obligation to serve all customers on reasonable terms. This means that shareholders accept a return on investment equivalent only to something like the market cost of capital—the minimum that investors must see a reasonable prospect of earning if they are to put up the necessary funds—along with the duty conscientiously to anticipate the future needs of the public and to make whatever investments may be necessary in order to meet them efficiently.[7]

The service areas received by the utility are relied upon by it and its investors and lenders in planning and constructing and acquiring the facilities needed to provide

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[7] Kahn, *Who Should Pay for Power-Plant Duds?*, Wall St. J., Aug. 15, 1985, at 26, Col. 3 (emphasis added).

service within the area. The rights to these service areas provided by certificates of public convenience and necessity and similar instruments have been recognized by this Court, the Idaho Court, and other courts as property rights protected by the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution. *Frost v. Corporation Commission*, 278 U.S. 515, 519-21 (1928); *City of Owensboro v. Cumberland Telephone Co.*, 230 U.S. 58, 65-66 (1912); *Cambridge Telephone Co. v. Pine Telephone Systems, Inc.*, 712 P.2d 576, 579 (Idaho 1985); *Rock Island Motor Transit Co. v. United States*, 90 F. Supp. 516, 522 (N.D. Ill. 1949); *Western Colorado Power Co. v. Public Utilities Commission*, 428 P.2d 922, 926-27 (Colo. 1967).

In *Boise Artesian Hot and Cold Water Co. v. Boise City*, 230 U.S. 84, 90 (1912), this Court held that a right to lay and maintain water pipes in streets granted to a private water company by a municipal ordinance was a "substantial property right" having "all of the attributes of property." *Id.* at 90. In commenting on the reliance placed by the private company on this property right, the Court stated:

> The grant was made in contemplation of the investment of large capital in the construction of a system of water works for the permanent supply of the city with water. The presumption is that no such enterprise would have been entered upon if the street easement was subject to immediate revocation.

Id. at 91.

In recent years, rising construction costs, the OPEC monopoly pricing of oil (and the corresponding increases in the prices of other fuels), and, in response to higher electrical service rates, a reduction in the growth of demand for electrical power have converged to impose severe burdens upon investor-owned utilities which threaten their ability to continue to furnish the electrical power demanded by the public. In addition, their posi-

tion and the enormous investment in their capital facilities are being significantly eroded by increased competition from government-owned utility systems. The Idaho Court's decision constitutes a further and substantial departure from established law and a threat to the investor-owned utility industry at a time when they are under severe adverse pressure because of market and other factors.

B. Denial of Substantive Due Process.

The Idaho Court's decision deprives Utah Power of its property without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

The Idaho Court and the IPUC erred in holding that the fact that Utah Power possessed a valid certificate of convenience and necessity to serve Butte County "was not a dispositive factor" in deciding the case. Opinion, Appendix, p. 9a, *infra*.

The Idaho Court has expressly recognized that:

> There is no question that the certificate of convenience and necessity issued to Cambridge is a property right protected by the due process provisions of the United States and Idaho Constitutions. U.S. Const. Amend. V, Amend. XIV, § 1; Idaho Const. Art 1, §§ 13-14. *E.g., Frost v. Corporation Commission of State of Oklahoma*, 278 U.S. 515, 49 S. Ct. 235, 74 L. Ed. 483 (1929); *City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U.S. 58, 33 S. Ct. 988, 57 L. Ed. 1389 (1913); *Western Colorado Power Co. v. Public Utilities Comm'n.*, 168 Colo. 61, 428 P.2d 922 (1967); *Mississippi Power & Light Co. v. City of Clarksdale*, 288 So. 2d 9 (Miss. 1973).

Cambridge Telephone Co. v. Pine Telephone, 712 P.2d 576, 579 (Idaho 1985). In *Cambridge Telephone*, the Idaho Court held that there had been no unconstitutional

"taking" of Cambridge Telephone's property because its certificate of convenience and necessity was subject to a statutory condition under *Idaho Code* § 61-526, and that it could be modified or revoked if required by the "public convenience and necessity." 712 P.2d at 580. However, the Idaho Court expressly held that this rule does not apply:

> [i]f the utility were presently serving the area or had substantially completed the extension [of service into the area] . . . .

712 P.2d at 580 n.2.

It is undisputed in this case that Utah Power furnished electric power to the INEL facility, either by furnishing part of the power required by the DOE or by being ready, on a standby basis, to provide whatever portion of the DOE's electrical energy requirements under the Three Party Agreement that could not be furnished by Idaho Power, continuously from 1943 until the Three Party Agreement was terminated as of October 31, 1986. It also is undisputed that Utah Power has continuously maintained a readiness to provide, on demand, all of the electric power requirements of the DOE during this period. It is further undisputed that Utah Power has provided the entire *delivery* service during this period over its facilities, primarily its Goshen-Scoville transmission line and its Antelope substation. Furthermore, it is not disputed that Utah Power, since obtaining the Utah Power Certificate in 1929, has expended substantial sums to construct, maintain, and operate facilities in Butte County to enable Utah Power to meet its service obligations under the Utah Power Certificate and the Three Party Agreement. Indeed, the Idaho Court has rejected DOE's claim that it was not a customer of Utah Power under the Three Party Agreement, *United States v. Utah Power & Light Co.*, 570 P.2d 1353 (Idaho 1977) and has stated that Utah Power has provided valuable service to the DOE under the Three Party Agreement, including a contractual obligation to be "responsible

for supplying a fixed percentage of kilowatt hours annually scheduled" for the INEL facility. *United States Department of Energy v. Idaho Public Utilities Commission*, 682 P.2d 99, 101 (Idaho 1984). *See also*, Opinion, Appendix, pp. 11a and 12a, *infra*. In addition, it is not disputed that Idaho Power has no facilities of its own with which to deliver power to the INEL and that Utah Power's transmission lines and Antelope substation are the only facilities for the delivery of such power.

Furthermore, it is not disputed that Utah Power has always been and remains ready, willing, and able to provide all of this service nor has the IPUC or the Idaho Court ever claimed or made any finding or conclusion that Idaho Power's service was any better or different from that provided by Utah Power. The Idaho Court acknowledged that Utah Power had a "valid certificate" for Butte County which it obtained before the Three Party Agreement was entered into and before Idaho Power obtained its "certificate". Opinion, Appendix, p. 3a, *infra*. Furthermore, notwithstanding that Idaho Power obtained the Idaho Power Certificate in 1969, it did not seek to provide and did not provide any service to the DOE other than the service it provided pursuant to the Three Party Agreement.

The decisions of the Idaho Court and the IPUC in this case extend the rule of the *Cambridge Telephone* case in a way which is in conflict with decisions of the courts of last resort of other states.

In *Application of Trico Electric Cooperative, Inc.*, 377 P.2d 309 (Ariz. 1962), the Arizona Supreme Court held that the territorial rights embodied in a certificate of public convenience and necessity are property rights and that the Arizona regulatory commission had a duty to prohibit a private utility under its jurisdiction from competing in the certificated area without a showing that the certificated utility had failed or refused to render

satisfactory and adequate service therein, at reasonable rates. The Arizona court stated:

> By the issuance of a certificate of convenience and necessity to a public service corporation, the State in effect contracts that if the certificate holder will make adequate investment and render competent and adequate service, he may have the privilege of a monopoly as against any other private utility.

377 P.2d at 315. And in *James D. Paul Water Company v. Arizona Corporation Commission*, 671 P.2d 404 (Ariz. 1983), the Arizona court stated that if a certificate of convenience and necessity "means anything, it means that its holder has the right to an opportunity to adequately provide the service it was certified to provide." 671 P.2d at 407.

In *Public Service Company of Colorado v. Public Utilities Commission*, 485 P.2d 123 (Colo. 1971), the Colorado Supreme Court held that the Colorado Public Utilities Commission's attempt to negate the previous certificate of an electric utility was a denial of due process in the absence of showing that the utiilty was unwilling or unable to extend its existing lines into areas within its certificated area, even though another utility could more easily serve electric customers in such areas. *See also Town of Fountain v. Public Utilities Commission*, 447 P.2d 527 (Colo. 1968); *Public Service Company of Colorado v. Public Utilities Commission*, 483 P.2d 1337 (Colo. 1971).

In *Mississippi Power & Light Co. v. City of Clarksdale*, 288 So. 2d 9 (Miss. 1974), the Mississippi Supreme Court held that a certificate of convenience and necessity cannot be infringed "so long as the utility is capable of rendering electric service to the public located in the area." 288 So. 2d at 11. The court emphasized that the operation of a public utility requires a large capital investment and that the value of this investment "depends on the continuity as a matter of right of the operations authorized and required by the franchise." *Id.* at 12; *see*

also Capital Electric Power Association v. Mississippi Power & Light Co., 218 So. 2d 707 (Miss. 1969) (a customer's desire to be served by another utility is not sufficient to allow the other utility to invade a certified area).

In *In re Northwestern Bell Telephone Co.*, 150 N.W.2d 922 (Neb. 1967), the Nebraska Supreme Court held that a utility cannot obtain a certificate of public convenience and necessity to provide service in an area covered by another utility's certificate unless it is established that the certificated utility is not providing or will not within a reasonable time provide reasonably adequate service.

To the same effect are the following cases: *State of North Carolina, ex rel. Utilities Commission v. Carolina Telephone and Telegraph Company*, 148 S.E.2d 100 (N.C. 1966); *Chicago & West Towns Railways, Inc. v. The Illinois Commerce Commission*, 48 N.E.2d 320 (Del. 1943).

The Idaho Court also erred in stating that the conclusion of IPUC that "Idaho Power Company has a valid certificate of public convenience and necessity to serve DOE" is a "factual" finding. Opinion, Appendix, p. 8a, *infra*. Whether or not Idaho Power's certificate is "valid" is a question of law and this legal question was the ultimate issue the Idaho Court was called upon to decide. Instead, it avoided the question and, *assuming* that Idaho Power's certificate was valid, held that Idaho Power could be the sole supplier to the DOE because,

> as between two utilities with valid certificates to deliver energy at transmission voltage, the utility that is currently and satisfactorily serving the disputed area may continue to do so.[8]

Opinion, Appendix, p. 9a, *infra*.

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[8] Utah Power meets this test since, as stated above, it had continuously provided at least stand-by service to the INEL.

As a consequence of the foregoing errors of the Idaho Court and the IPUC, Utah Power has been deprived of a substantial property right without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

C. Denial of Procedural Due Process.

The Idaho Court's decision deprives Utah Power of its property without notice or an opportunity to be heard in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

The Idaho Court erred in upholding the IPUC's conclusion that the Idaho Power Certificate authorized it to provide service to the DOE at the INEL site within Butte County.

To construct its segment of the AMPS line, Idaho Power had to obtain a certificate of convenience and necessity for Butte County. In 1969, Idaho Power applied for a certificate for a *transmission line* across Butte County. The decisions of the Idaho Court and the IPUC authorize Idaho Power to furnish electric power to the DOE within Butte County pursuant to the Idaho Power Certificate. These decisions (1) expand Idaho Power's authority beyond that with respect to which Utah Power had notice or an opportunity to be heard in 1969, and (2) constitute an amendment or partial cancellation of the Utah Power Certificate for which there was no notice or opportunity to be heard as required by law.

Notice and an opportunity to be heard are fundamental due process rights. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950); *Grindstone Butte Mutual Canal Co. v. Idaho Power Co.*, 574 P.2d 902, 907 (Idaho 1978). "Notice" means more than just bare notice; due process requires notice of the issues to be considered. *Grindstone*, 574 P.2d at 907. In

testing the adequacy of required notice, the Court must exercise its independent judgment. *Grannis v. Ordean*, 234 U.S. 384, 394 (1914).

The granting of a certificate of public convenience and necessity requires strict compliance with the procedural prerequisites of notice and hearing. *Application of Citizens Utilities Company*, 351 P.2d 487 (Idaho 1960); *Application of Trico Electric Cooperative, Inc.*, 377 P.2d 309 (Ariz. 1962); *Public Service Company of Colorado v. Public Utilities Commission*, 485 P.2d 123 (Colo. 1971); *Northfield Woods Water & Utility Co. v. Illinois Commerce Commission*, 329 N.E.2d 295 (Ill. Ct. App. 1975). Under Idaho law, Idaho Power could not obtain a certificate of public convenience and necessity and Utah Power could not be deprived of its rights in Butte County without compliance with the provisions of Sections 61-526 and 61-528, *Idaho Code*.[9] These require not only a formal hearing, pursuant to notice, but also findings and conclusions by the IPUC, supported by proof, that Utah Power is not serving or willing and able to serve the area, or is serving it unsatisfactorily or in violation of law. Only then could the IPUC alter Utah Power's certificated rights and grant them to someone else. *Idaho Power & Light Co. v. Blomquist*, 141 P. 1083 (Idaho 1914); *McFayden v. Public Utilities Consolidated Corporation*, 299 P. 671, 673 (Idaho 1931); *Applications of Intermountain Gas Company*, 289 P.2d 933 (Idaho 1955); *Allied Van Lines v. Idaho Public Utility Commission*, 312 P.2d 1050 (Idaho 1957). See also cases cited at pages 16 through 18 herein.

The Idaho Power Application gave no notice that Idaho Power was seeking authority to serve customers in Butte County. Neither Idaho Power nor the IPUC

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[9] *See* Appendix, pp. 65a through 66a, *infra*. Section 61-528 was last amended in 1915, prior to the date of the Idaho Power Application. Section 61-526, although amended in 1970, remains materially as it was at the date of the Idaho Power Application.

gave any indication that, after having served the DOE for 19 years under the Three Party Agreement, Idaho Power was then seeking authority to provide electric service to DOE directly, independent of the Three Party Agreement. No hearing with respect to the public convenience or necessity for it to provide service to customers was ever held. Indeed, Idaho Power stated that the construction of the transmission line "will not compete with any other public utility, corporation or person." Idaho Power Application, Appendix p. 78a, *infra*. The title to both the Idaho Power Application and the Idaho Power Certificate state that they are for *"For Transmission Line Only."* Furthermore, Idaho Power stated in the Idaho Power Application that it already had "certificates of convenience and necessity for general electric service in Power and Bingham Counties," *id.*, and was applying only for transmission line authority in those counties. Nothing in its application requested any broader authority for Butte County. A certificate of convenience and necessity for a transmission line does not include the authority to provide service to customers in the areas where the transmission line is located. *Rocky Mountain Natural Gas Co. v. Public Utilities Commission*, 617 P.2d 1175, 1177 (Colo. 1980).

Nor were these statutory and due process requirements met with respect to Utah Power's rights under the Utah Power Certificate which the Idaho Court and the IPUC, in their decisions, effectively amended or partially cancelled retroactive to 1969. The property right represented by the certificate can only be revoked or modified upon a definite charge and proof that Utah Power has failed or refused to provide the service it is bound to provide under the Utah Power Certificate. *Allied Van Lines v. Idaho Public Utility Commission*, 312 P.2d 1050 (Idaho 1957); *Union Electric Company v. Illinois Commerce Commission*, 235 N.E.2d 604 (Ill. 1968). No such charges were made at the time Idaho Power applied for and received the Idaho Power Certificate nor has the

IPUC ever made any findings or conclusions that Utah Power is unwilling or unable to serve the INEL. Indeed, the IPUC found that Utah Power had "sufficient existing capacity and dispatch capacity to serve the DOE," IPUC Order, Appendix, p. 37a, *infra*, and it is undisputed that Utah Power has the only delivery facilities to serve the INEL.

Notice and an opportunity to be heard are the *sine qua non* of due process. This elemental requirement was never met in this case and Utah Power has now learned, without warning, and to its astonishment, that its property rights was surreptitiously taken from it in 1969.

CONCLUSION

The questions presented by this appeal are so substantial as to require for their resolution plenary consideration by this Court, with briefs on the merits and oral argument. State regulators and state courts are in need of guidance from the Court. The constitutional questions concerning utility certificates of public convenience and necessity are too important to allow state regulators and state courts to be the only tribunals to consider them. This Court should reverse the Idaho Supreme Court decision and remand the case with instructions to require the Department of Energy to obtain electrical service within the area covered by the Utah Power Certificate from Utah Power.

DATED this 15 day of April, 1987.

Respectfully submitted,

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April 15, 1987

APPENDICES

APPENDIX A

1986 Opinion No. 154

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Pocatello, September 1986
Term of Court

No. 16363

UTAH POWER & LIGHT COMPANY,
Appellant,

v.

THE IDAHO PUBLIC UTILITIES COMMISSION,
UNITED STATES DEPARTMENT OF ENERGY,
and IDAHO POWER COMPANY,
Respondents.

Filed: November 26, 1986

Frederick C. Lyon, Clerk

Appeal from the Idaho Public Utilities Commission.

Appeal from orders granting Idaho Power Co. the right to be sole supplier of electrical energy to the Idaho National Engineering Laboratory upon termination of the three-party agreement between Utah Power & Light, Idaho Power Co., and the U. S. Department of Energy. *Orders affirmed.*

Wesley F. Merrill (appeared); Stephen S. Dunn (argued), Pocatello, Idaho; and Thomas W. Forsgren, Salt Lake City, Utah, attorneys for the appellant.

Hon. Jim Jones, Attorney General; Peter J. Richardson, Deputy Attorney General (argued) for respondent I.P.U.C.; Larry D. Ripley (argued) and Ronald L. Williams (appeared) for respondent Idaho Power; Warren Derbidge (appeared) and Betty L. Hollowell (argued) for respondent U.S. Department of Energy.

HUNTLEY, J.

This appeal presents the issue of whether the Idaho Public Utilities Commission (IPUC) should be sustained in its entry of an order wherein it determined that, as between Utah Power & Light Co. (UP&L) and Idaho Power Co. (IPC), the latter is the appropriate utility to provide future service to the Idaho National Engineering Laboratory operated by the U.S. Department of Energy (DOE) and located near Arco, Idaho.

A synopsis of the history of electrical service to the area in question is as follows: Electrical service was first provided in the area (i.e. to the City of Arco) by UP&L in 1925. Electrical service to the Naval Proving Grounds (predecessor to DOE) was first and exclusively provided by UP&L in 1943. In 1949, UP&L signed a 100 kilowatt electrical supply contract with the Atomic Energy Commission (predecessor to DOE), with the point of delivery to be the Scoville substation, owned by DOE, in Butte County. A three-party agreement was entered into in 1950 to provide that energy, with the U.S. Atomic Energy Commission designated as "buyer," IPC as "seller" and UP&L "a party of the second part to the extent hereinafter provided."

Under the three-party agreement, approved by the IPUC, both Idaho Power and Utah Power billed DOE

directly for their respective services, with the funds being deposited in a "pool account" and disbursed periodically under a separate two-party agreement between the utilities. Over the past thirty-five years DOE received less than 2% of its total energy from UP&L, UP&L primarily supplying standby capacity. Since 1978, IPC has been the sole supplier of energy to DOE.

At the time the three-party agreement was entered into, the sole certificate of public convenience and necessity for electrical service to customers in Butte County rested with UP&L. That agreement provided UP&L would construct a 132 kilovolt service line from Goshen substation (owned by UP&L) to Scoville substation (owned by DOE). This line was the sole transmission connection for power to DOE from 1950 to 1970.

In 1957, the three-party agreement was amended to provide for the increased power requirements of DOE, with those requirements being increased from 20,000 kilowatts to 40,000 kilowatts. At the same time, UP&L and IPC entered into a two-party agreement regarding the method of transmission of the power, with UP&L largely responsible for delivery.

In February 1969, IPC was also granted a certificate of convenience and necessity for Butte County, which was amended later that year (amended certificate #268) and was "limited to the transmission, interchange and supply of high voltage electric power and energy."

In 1970, IPC, UP&L and Montana Power Company constructed the AMPS line, a 230 kilovolt transmission line. UP&L, at the same time, built Antelope substation one-half mile east of DOE's Scoville, substation, giving DOE access to power supplied by the AMPS line.

On January 30, 1985, DOE petitioned the IPUC for a declaratory ruling that IPC, rather than UP&L, has the right to be sole supplier of electricity to INEL.

Several issues are before us on appeal: Whether the IPUC had jurisdiction to decide the issues raised and whether the case presented a controversy ripe for resolution; whether the IPUC correctly rejected the Electric Supplier Stabilization Act (ESSA) (I.C. § 61-332 et seq.) as the controlling statutory scheme, and; whether the IPUC's finding that upon termination of the agreement, IPC is entitled to be sole supplier to DOE is supported by the evidence. We deal with each issue in turn.

JURISDICTION AND RIPENESS

In an order dated May 3, 1985, the IPUC concluded that it was vested with jurisdiction over the DOE's petition for declaratory ruling and that the petition presented a controversy ripe for resolution, although prospective in nature, as the three-party agreement had not yet been terminated. UP&L contends that the IPUC erred in so concluding as DOE had not made a definite commitment to terminate the three-party agreement.

Athough Idaho public utilities law does not specifically provide for declaratory judgments, the IPUC found that the Idaho Uniform Declaratory Judgments Act applied, as that act provided "the only place to look for guidance. . . ." The IPUC cited I.C. § 10-1203 of the Uniform Declaratory Judgments Act, which provides for the issuance of a declaratory judgment in a contract dispute "before or after there has been a breach." Harris v. Cassia County, 106 Idaho 513, 516-517, 681 P.2d 988, 991 (1984).

The IPUC further found that "the Department of Energy's status as an electric customer would be treatened if it exercised its right to terminate the three-party agreement [without knowledge of the result of such action]."

We agree with the analysis of the IPUC and hold that, for the reasons stated, the IPUC correctly decided that

it had jurisdiction to decide the issues presented by this case and that the issue was ripe for resolution.

THE STATUTORY SCHEME

UP&L next contends that the IPUC erred in failing to decide the controversy under the statutory scheme provided by the Electric Supplier Stabilization Act (ESSA) (I.C. § 61-332 et seq.) and, instead, finding that I.C. §§ 61-501, -526 and -528 provide the appropriate guidance and authority to the IPUC in this case. We hold that the IPUC was correct in ruling that ESSA is inapplicable to this situation.

UP&L urges that I.C. § 61-332B of the ESSA is controlling. That section provides:

> 61-332B. Electric supplier prohibited from serving consumers or former consumers of another supplier. —No electric supplier shall construct or extend facilities, nor make any electric connections, nor permit any connections to be made to any of its facilties for the purpose of supplying electric service nor shall it supply or furnish electric service to any electric service entrance that is then or had at any time previously been connected for electric service to facilities or another electric supplier, without the written consent of such other electric supplier; provided, however, (a) such other electric supplier is then, or was previously the last supplier, lawfully connected to said electric service entrance, and (b) such other electric supplier is will [sic] and able to provide adequate electric service.

UP&L asserts that, under this analytic scheme, UP&L *is* a prior supplier willing and able to adequately supply DOE and has not given consent to IPC to solely supply DOE. Accordingly, UP&L asserts, the finding of the IPUC that IPC is entitled to supply DOE upon termination of the three-party agreement is erroneous. We are not persuaded.

I.C. § 61-334(2) of the ESSA is controlling and reads:

> 61-334. Special rules of interpretation.—Nothing contained in this act shall be construed to:
>
> . . . .
>
> 2. Apply to controversies between two (2) or more public utilities.
>
> . . . .

UP&L would have us interpret that statute to require only that controversies *exclusively* between two or more public utilities not be governed by the ESSA. The language of I.C. § 61-334(2), however, speaks for itself and we must construe statutes according to their plain and obvious meanings. Hartley v. Miller-Stephan, 107 Idaho 688, 692 P.2d 332 (1985); Union Pacific Railroad Co. v. State Tax Commission, 105 Idaho 471, 670 P.2d 878 (1983). Further, when viewed in a context which takes account of the case law existing at the time the ESSA was enacted, it is apparent that the legislature's purpose in enacting the Act was to vest district courts with jurisdiction to address service territory disputes between utilities and either cooperatives or (later) municipalities not subject to the jurisdiction of the IPUC. Clearwater Power Co. v. Washington Power Co., 78 Idaho 150, 299 P.2d 484 (1956) (one year prior to the enactment of the ESSA, this Court held the IPUC did not have jurisdiction to address a dispute between a public utility and cooperative); Unity Light & Power Co. v. City of Burley, 83 Idaho 285, 361 P.2d 788 (1961) (holding no IPUC jurisdiction in a dispute between a public utility and municipality). The ESSA was not, as UP&L asserts, intended to provide consumers with an express statutory mechanism by which they would be able to take their disputes with one or more utilities before the IPUC. Neither was it intended to provide an alternative forum for disputes between two public utilities more appropriately heard by the IPUC.

Although no express statute in the public utilities law provides authority to the IPUC in this instance, the

broad general power of the IPUC (I.C. § 61-501), coupled with its powers of certification provide a basis for jurisdiction in this unique factual situation.

This Court has often ruled that the IPUC has every power, express or implied, necessary to enable it to exercise its powers and purposes. Washington Water Power Co. v. Kootenai Environmental Alliance, 99 Idaho 875, 591 P.2d 122 (1979); Lemhi Telephone Co. v. Mountain States Tel. & Tel., 98 Idaho 692, 571 P.2d 753 (1977); United States v. Utah Power & Light Co., 98 Idaho 665, 570 P.2d 1353 (1977). Further, it is a principle of long-standing that the IPUC has the duty to resolve customer or service territory disputes between regulated utilities. Idaho Power & Light Co. v. J.A. Blomquist, et al., 26 Idaho 222, 141 P. 1083 (1914). Therefore, despite the anomalous lack of express authority granting IPUC jurisdiction in the instant case, these factors, coupled with the absence of a more appropriate forum and the fact that the IPUC has exclusive jurisdiction over territorial disputes between two public utilities (I.C. § 61-526), the IPUC found jurisdiction to hear the instant case.

UP&L also argues that a failure to apply the ESSA in the instant case will subvert the stated intent behind the ESSA—specifically, the desire to promote harmony between electrical suppliers, to prohibit the "pirating" of customers of another supplier and to discourage duplicative electric facilities. (I.C. 61-332B). However, the concern that sustaining the IPUC order might signal utilities that we now condone the "pirating" away of customers of competing utilities found within the geographic area stated in another utility's certificate of convenience and necessity is ill-founded. No such condonation is intended. We are addressing an unique fact situation with this holding which must, then, be interpreted narrowly. In the instant case, we are not dealing with certificates of public convenience and necessity for *general service* in a

franchise area. Rather, we are dealing solely with delivery to a special contract customer (DOE) in a situation where both utilities had authority to deliver energy at *transmission* voltage, and more importantly, where there is a history under a long-standing contract between the two utilities and its customer which had been approved by the IPUC. That history shows that Idaho Power was, and has been for a long number of years, the primary supplier of the energy to DOE.

THE FACTUAL FINDINGS OF THE IPUC

We turn now to the central issue of this appeal: whether the commission's decision providing, that upon termination of the three-party agreement, Idaho Power was entitled to be the sole supplier of DOE is supported by substantial evidence and the applicable law.

Our standard of review of IPUC decisions is limited.

> "[O]ur focus must be upon the evidence presented to the commission. If the evidence is competent and substantial in support of the findings made and there has been no clear abuse of discretion, this court is constrained to affirm those findings." Grindstone Butte Mutual Canal Co. v. Idaho Public Utilities Commission, 102 Idaho 175, 178, 627 P.2d 804, 807 (1981) (see also, Hayden Pines Water Co. v. Idaho Public Utilities Commission, —— Idaho ——, (Opinion No. 1986-104, filed July 15, 1986); Idaho Power Co. v. Idaho Public Utilities Commission, 108 Idaho 943, 703 P.2d 707 (1985); Utah-Idaho Sugar v. Intermountain Gas Co., 100 Idaho 368, 597 P.2d 1058 (1979).)

Two factual findings of the IPUC are before us: First, the IPUC finding that Idaho Power Company has a valid certificate of public convenience and necessity to serve DOE and; second, the IPUC finding that the Idaho Power Company is currently supplying DOE's entire load, which finding supports the conclusion that the Idaho Power

Company should be entitled to solely supply DOE upon termination of the three-party agreement.

There is ample evidence in the record to sustain both findings of the Public Utilities Commission. The commission correctly recognized that, while Idaho Power Company's amended certificate No. 268 gave it no general grant of authority to serve all customers in Butte County, the certificate nevertheless allowed Idaho Power to *supply* the power and energy at *transmission* level for the benefit of one customer—DOE. The fact that UP&L also possessed a valid certificate of convenience and necessity was not a dispositive factor in the commission's order. Instead, the commission looked to the history underlying the three-party relationship, as well as the comparative reliability, as between UP&L and IPC, of the utilities' *transmission* capability. There was further evidence that public interest factors, such as the likely effect on rates to be paid by Idaho ratepayers weighed heavily in favor of Idaho Power Company. However, neither factor was a basis for either the findings or conclusions in the commission's order.

Rather, the commission correctly decided that, as between two utilities with valid certificates to deliver energy at transmission voltage, the utility that is currently and satisfactorily serving the disputed area may continue to do so. Such a conclusion is mandated by the unique factual situation presented by this case—that of a heavy consumer dependent upon a continuous, reliable, large-scale supply of electricity.

We reiterate that this holding is in no way meant to implicitly approve the "pirating away" of customers encompassed within the geographical area contained in another utility's franchise area supported by a valid certificate of convenience and necessity. Instead, we are responding to the peculiarities of the situation before us, that is, where two utilities once shared the authority to

serve a customer and it is now necessary to determine which of the two shall continue the service.[1]

Since the findings of the commission are supported by substantial and competent evidence and there has been demonstrated no clear abuse of discretion, the order of the Idaho Public Utilities Commission ruling that Idaho Power Company is the appropriate utility to provide future service to the INEL is affirmed.

Costs to respondents. No attorney fees on appeal.

DONALDSON, C.J., SHEPARD and BISTLINE, JJ., concur.

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[1] Much of what is stated in the dissent of Justice Bakes would have merit and be applicable if we were dealing with one utility attempting to carve out one or more *general service* customers in the franchise area of another utility. However, the special history of these parties as herein recounted, demonstrates this is not such a case.

BAKES, J., dissenting:

The Department of Energy (DOE) is once again before this Court seeking a favorable result in its ongoing battle to have Idaho Power Company declared the sole legal supplier of electricity for the Idaho National Engineering Laboratory. In 1977 this Court decided United States v. Utah Power & Light Co., 98 Idaho 665, 570 P.2d 1353 (1977). That case involved an Idaho Public Utilities Commission order which granted UP&L a rate increase. At that time DOE strenuously argued, to no avail, that it was not even a customer of Utah Power & Light (UP&L) under the three-party contract. Appellant's Brief at 14, United States v. Utah Power & Light Co., *supra*.

Then again, in 1984, DOE once again came before this Court in United States Department of Energy v. Idaho Public Utilities Commission, 106 Idaho 558, 682 P.2d 99 (1984), and argued that "the conclusion [by the IPUC] that DOE contracted with UP&L for readiness to—supply, a 'reserve,' 'standby' or 'back-up' capacity, or for maintenance of any capacity is not supported by contract language or record evidence." Appellant's Reply Brief at 2, 106 Idaho 558, 682 P.2d 99 (1984). We upheld the commission's conclusion to the contrary, describing the arrangement as follows:

> "The contract envisioned that Idaho Power and UP&L would act jointly, in cooperation, in furnishing the energy needs of the National Reactor Testing Station. The AEC, acting in the interests of common defense and security, sought to *insure* that it would receive dependable firm power and chose to do that by contracting with two utilities for a fixed amount of power for which it would pay whether or not it was actually used, *i.e.*, readiness-to-supply energy. AEC specified and agreed that the two utilities should cooperate in this endeavor, but did not list the terms of that cooperation in the three party contract itself.

> What the AEC did specify in the three-party agreement was that it would pay a certain rate for a specified number of kilowatts per month, such kilowatt level to be set by AEC annually. UP&L and Idaho Power had no power to alter the AEC's obligations under the three-party contract in a later agreement; they merely had the right to define their own respective obligations within the parameters of the three-party agreement. This is exactly what they did. They divided the total number of kilowatts for which they were jointly responsible under the three-party agreement, and each agreed to be individually responsible for supplying a fixed percentage of the kilowatt hours annually scheduled by AEC." U.S. Dept. of Energy v. Idaho P.U.C., 106 Idaho 558, 560, 682 P.2d 99, —— (1984) (footnote omitted, emphasis in original).

During all this "extended family" of litigation DOE has failed to exercise its option to cancel the three-party agreement.[1] It can be reasonably ascertained that DOE failed to exercise its option because it realized that, if there is no contract, UP&L, and not Idaho Power, was the only utility authorized by a "certificate of convenience and necessity" to provide service to DOE. As unpallatable as the three-party agreement apparently is to DOE, that agency apparently finds buying its power solely from UP&L even more distasteful. In this case, persistence has paid off as the IPUC, and now the majority of this Court, has allowed DOE to accomplish what it could not accomplish in 1977 and 1984—that is, DOE is finally free of UP&L, the only electrical power company holding a certificate to serve Butte County.

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[1] After the IPUC issued its ruling in this case, concluding that Idaho Power had authority to supply power directly to DOE in Butte County, DOE exercised its option to cancel the three-party agreement, apparently in favor of dealing directly with Idaho Power.

The facts in this case are somewhat unique to the three-party contract which is alluded to in the majority opinion. The Idaho National Engineering Laboratory (INEL) was established as part of the United States Nuclear Energy Development Program and is now operated by the Department of Energy. The principal parties involved in the underlying contract dispute (DOE, UP&L and IPC) first entered into a contractual relationship to deliver power to the INEL in 1950. The goal of the contract was to assure that the power needs of the INEL were met. "The agreement was entered into in the interest of the 'common defense and security.'" U.S. Dept. of Energy v. Idaho Public Util. Comm'n, 106 Idaho 558, 559, 682 P.2d 99, 100 (1984). Since Utah Power was the only utility authorized to supply electrical power in Butte County where DOE was located, the function of the three party agreement, which had two electrical utilities as suppliers, was to provide the necessary reserve capacity to ensure an uninterrupted supply of power for the important and ultra-dangerous atomic reactors which DOE would be constructing in Butte County. The transcript of the commission proceedings, contained in the record on appeal in Department of Energy v. Idaho Public Util. Comm'n, *supra*, indicates the purpose of the three-party contract and the essential backup function of a second utility when, in its Order No. 17602, the commission stated:

> "Although DOE argued vigorously that it is paying more than the backup capacity is worth, we find their arguments and proposed solutions unpersuasive. DOE purposely entered into a contract with the two utilities so that it could have reserve capacity from two separate systems. DOE contracted for this extra margin of safety."

In 1957 a revised three-party agreement was entered into, increasing the amount of electrical power to be supplied, because "the successful operation of [INEL] requires a

dependable supply of firm electrical power in an amount greater than that provided under the 1950 agreement . . . ." 106 Idaho at 559, 692 P.2d at 100. That three-party contract situation has existed from 1950 until the present time.

This is not the ordinary public utilities case, and the majority's decision could be likened to settling a long and involved contract dispute. However, it is evident that the majority has failed to (1) realize the broader constitutional implications of this case, and (2) fully analyze the record upon which the IPUC decision was made.

I

A. *Procedural Due Process*

Utah Power & Light Company (UP&L) has for many decades held a certificate of convenience and necessity to provide electrical service for Butte County, Idaho. It is the only electrical utility which has a certificate to sell electrical power in Butte County. It is axiomatic that that certificate is a property right protected by the due process provisions of both the United States and Idaho Constitutions. Cambridge Telephone Co. v. Pine Telephone, 109 Idaho 875, 712 P.2d 576 (1985). UP&L is, therefore, entitled to the procedural due process of fair notice and a hearing, and substantive due process—payment of just compensation—before that property right to serve Butte County can be taken or diminished.

In 1969, five electrical companies—Idaho Power Company, Washington Water Power Company, Montana Power Company, Utah Power & Light Company and Pacific Power & Light Company—serving Utah, Idaho and Montana, entered into an agreement to build a high voltage transmission line to interconnect the electrical supply grid between the States of Montana and Idaho. Pursuant to that agreement, known as AMPS, the companies each constructed a portion of the interconnecting

transmission line. Idaho Power's portion of the transmission line included that portion which crossed Butte County, Idaho. Pursuant to that agreement in 1969, Idaho Power Company sought a certificate from the Idaho Public Utilities Commission for authority to construct and operate its portion of the AMPS transmission line across Butte County. Before Idaho Power could commence construction of its portion of the transmission line, it was required by I.C. § 61-526 to obtain a certificate of convenience and necessity from the commission. At that time, Utah Power & Light Company was serving the electrical needs of Butte County pursuant to its certificate of convenience and necessity which had been issued much earlier. In its application for authority to build its portion of the transmission line, Idaho Power represented that it was only seeking permission to *transmit* power across Butte County. IPC's application stated:

> "That said transmission line will be constructed and operated at a nominal voltage of 269,000 volts, and *the same will not be available for, or dedicated to, the furnishing of general services along its route, and the construction of this transmission line will not compete with any other public utility, corporation or person.*" (Emphasis added.)

Further on, the application states,

> "And that *said certificate* of convenience and necessity *be limited to the transmission, interchange and supply of high voltage electric power and energy herein set forth.*" (Emphasis added.)

As a party to the five-company agreement, and itself being responsible for the construction of a portion of the interstate transmission line, UP&L was well aware of Idaho Power's 1969 application for authority to build its portion of the line and to supply power into the interstate grid and transport it over the new line, and that Idaho Power could not have performed its portion of the

five-company construction agreement without obtaining such a certificate. However, there was nothing in Idaho Power's application for this certificate which even remotely suggested that Idaho Power was requesting authority to sell or distribute to any customer electric power within Butte County. Rather, Idaho Power stated that the application is "limited to the transmission, interchange and supply of high voltage electric power and energy" pursuant to the five-company interconnection agreement. The certificate by the commission, as issued pursuant to the application, did not and could not grant any other authority than that requested in the application without giving UP&L adequate notice and an opportunity to be heard. Intermountain Gas Co. v. IPUC, 97 Idaho 113, 540 P.2d 775 (1975).

In the *Intermountain Gas Co.* case, a rate application case, the Public Utilities Commission had issued an order requiring Intermountain Gas to discontinue the sale of natural gas appliances. This Court set aside the commission's order for failure to give adequate notice of IPUC proposed action. The Court stated, "However, by filing for a rate increase, Intermountain was not put upon notice that, nor could it have reasonably anticipated that the question of whether it could continue to conduct its retail gas appliance business was before the commission."

UP&L is in the same position as was Intermountain Gas. Adequate notice was simply not provided in 1969 to justify the taking without notice of UP&L's exclusive right to sell power in Butte County. In 1969, when Idaho Power filed its application for a certificate to construct the transmission line and transmit, interchange and supply high volutage electric power "pursuant to said interconnection [1969 five-party] agreement," nothing in the plain wording of the application put Utah Power on notice that its exclusive right to serve Butte County was being taken away, and that some seventeen years later, in 1986, Idaho Power and the commission would interpret

the 1969 certificate of public convenience to grant Idaho Power competing authority in Utah Power's Butte County area. This is particularly true in view of IPC's application's assertion that the transmission line "will not be available for, or dedicated to, the furnishing of general services along its route, *and the construction of this transmission line will not compete with any other public utility, corporation or person.*" (Emphasis added.)

The commission's conclusion that its 1969 certificate granted to Idaho Power the authority to supply DOE is contrary to the historical facts in the record in this case, and is clearly erroneous. The commission states that since 1969 Idaho Power has been supplying electric energy to DOE pursuant to said certificate. However, Idaho Power has always served DOE through a contractual arrangement with UP&L, and this service has never been based on the 1969 certificate. When the three-party contract between Utah Power, DOE and Idaho Power was first entered into in 1950, Idaho Power had no authority to sell or distribute electric power in Butte County. Thus, it is clear from the record that for nineteen years, from 1950 through 1969, while Idaho Power was selling energy pursuant to the three-party contract, DOE was the customer of Utah Power, the only utility holding a certificate of public convenience and necessity to deliver and sell electric power in Butte County. For those nineteen years, 1950 through 1969, Idaho Power held no certificate to operate in Butte County, and thus could only have been selling energy through Utah Power as a result of the three-party agreement.

Idaho Power's application for its limited certificate in 1969 did not change the existing three-party arrangement among DOE, Utah Power and Idaho Power. As Idaho Power Company's 1969 application for the authority to build a transmission line points out, that:

> "*Pursuant to said interconnection agreement*, the 23KV transmission line and facilities in the State of

> Idaho will be constructed by Utah Power & Light Company from a point on the Montana state line to a point in the vicinity of Utah company's Scoville substation and by Idaho Power Company from the vicinity of Utah company's Scoville substation to Idaho Power Company's Brady substation near American Falls, Idaho, ..." (Emphasis added.)

In summary, the IPUC cannot now, in 1986, re-interpret the 1969 certificate to grant Idaho Power any greater rights in Utah Power's territory than was requested by IPC's original application for the certificate, without violating Utah Power & Light's procedural due process rights. IPC's application and certificate failed to provide UP&L with any notice that it intended to serve customers in Butte County. To the contrary, the application specifically stated that (1) the certificate of convenience and necessity would be limited to the transmission, interchange and supply of high voltage electric power and energy pursuant to the interconnection agreement, (2) that, pursuant to said interconnection agreement, the certificate would not be available for, or dedicated to, the furnishing of general services along its route, and (3) that the construction of this transmission line will not compete with any other public utility, corporation or person.

B. *Substantive Due Process*

In addition to interpreting the 1969 certificate in a method which demonstrates that UP&L had insufficient notice in 1969 to meet constitutional procedural due process rights, the arbitrariness of the IPUC action has also violated UP&L's substantive due process rights. This is clearly evident upon examining the record.

The principal task before the IPUC was to determine the scope of IPC's 1969 certificate of convenience and necessity. The IPUC conculsion was that

> "Idaho Power has a valid certificate of public convenience and necessity to serve customers in Butte County at transmission levels.
>
> . . . We base our decision on *IPC's certificate number 268* and the fact that Idaho Power is currently *serving* the entire DOE load."

These findings were derived solely by restricting its analysis to the three words "to supply power" contained in IPC's 1969 certificate. The commission ignored the representations made in IPC's application and the balance of the certificate, when they stated:

> "It would be an effort in futility to grant a certificate of public convenience and necessity instructing a utility to not serve the particular area. Certificates are grants of authority. When the commission issues a certificate that is 'limited to the transmission interchange and supply, etc. . . .' It is *granting* the authority to do these things. While Idaho Power's certificate gave it no general grant of authority to serve all customers in Butte County, it nevertheless allowed it to *supply* power and energy at the transmission level, and there was one customer for whose benefit this was obviously done: DOE." (Emphasis supplied by commission.)

What is obvious is that the 1969 certificate was not granted to IPC to serve the DOE since that federal government entity is not mentioned in the certificate or the application and since IPC's power line did not, and still does not, connect up with the DOE facility. The clear and unambiguous purpose of the 1969 certificate was to permit IPC to construct and transmit, supply and exchange power in the interstate grid pursuant to the five-party agreement. The record is clear that the 1969 AMPS agreement and IPC's sale of power to DOE pursuant to the three-party agreement were entirely unrelated occurrences. Nevertheless, the IPUC has somehow managed to intertwine the two agreements and base its

conclusion on this unjustified combination of the two unrelated agreements. Combining the two agreements to reach a finding that IPC has a valid certificate to serve DOE vividly demonstrates the lack of factual backing for the IPUC's conclusion. Therefore, due to the lack of support in the record, the decision is arbitrary and erroneous as a matter of law, and a *per se* a [sic] violation of substantive due process. As previously stated, this Court has held that a certificate of convenience and necessity is a property right protected by the provisions of both the United States and Idaho Constitutions. Cambridge Telephone Co. v. Pine Telephone, *supra.* Review of the commission's order by this Court requires that we protect those constitutional rights. The IPUC's order clearly has deprived UP&L of its property without due process of law and should be reversed.

II

Leaving the constitutional basis for reversing the IPUC order, I now turn to the majority opinion's willingness to accept the factually unsupported findings of the IPUC. The majority opinion states:

> "There is ample evidence in the record to sustain both findings of the public utilities commission. The commission correctly recognized that, while Idaho Power Company's amended certificate number 268 gave it no general grant of authority to serve all customers in Butte County, *the certificate nevertheless allowed Idaho Power to supply the power and energy at transmission level for the benefit of one customer—DOE.*" *Ante* at 8 (emphasis added).

The record clearly does not sustain this conclusion, nor does it sustain the conclusion of the IPUC. As pointed out in Part I of this dissent, the wording of the application and certificate *does not* even mention the DOE (by any of its aliases or by direct or indirect reference). To complicate matters, the commission's findings of fact which are supported by the record fail to support the commission's conclusions.

The IPUC Order No. 20136 makes the following findings which are supported by the record:

(a) In 1950 DOE, IPC and UP&L entered into a contract to serve the DOE site's electrical needs. As part of this contract, UP&L constructed the transmission lines that serve DOE.

(b) In 1957 a new three-party agreement between DOE, IPC and UP&L was entered into.

(c) Also in 1957, IPC and UP&L entered into a "pool account" for service to DOE which is still valid today.

(d) Between 1950 and 1969 IPC delivered power pursuant to the three-party contract and without a certificate to do so.

(e) There is no question that UP&L delivers all the electricity used by DOE through its Antelope substation.

(f) All power delivered to DOE is delivered pursuant to the three-party agreement.

Despite these findings of fact, the IPUC order states:

> "It is necessary for Idaho Power to have a certificate for Butte County to provide DOE with *retail transmission level supply* regardless of state-federal transmission law." (Emphasis in original.)

Then, recognizing that Idaho Power *must* have a certificate to serve Butte County, the order further on states:

> "We note here that *the contractual arrangement among the various parties are not dispositive* of the case. Rather, *we base our decision on IPCo's certificate* number 268 *and the fact that Idaho Power is currently* serving the entire DOE load." (Emphasis added.)

The foregoing two conclusions of the commission are not only inconsistent with each other, but are contrary to findings of fact (d), (e) and (f) above. By those find-

ings the commission acknowledged that (1) all power delivered to DOE is delivered pursuant to the three-party agreement; (2) there is no question that UP&L delivers *all the electricity used by DOE* through its Antelope Substation; (3) between 1950 and 1969 IPC delivered power *pursuant to the threeparty contract and without a certificate to do so.*

The statements by the commission that (1) "it is necessary for Idaho Power to have a certificate for Butte County to provide DOE with retail transmission level supply," (2) that "the contractual arrangement . . . [is] not dispositive," and (3) that its decision was based on IPC's certificate number 268 and the fact that Idaho Power is currently serving the entire DOE load, are absolutely contrary to the commission's findings of fact that all power delivered to DOE is delivered pursuant to the three-party agreement, and that it is "UP&L [which] delivers all the electricity used by DOE through its Antelope Substation." Idaho Power did not deliver power pursuant to its certificate number 268, because from 1950 through 1969 it did not have a certificate. From 1950 through 1986 all power was delivered through the three-party agreement, and nothing has changed factually to alter that relationship. During this entire period DOE's total electrical power needs were delivered by UP&L through its Antelope Substation.

In 1950, when this arrangement began, only UP&L held a certificate to serve Butte County where the DOE is located. IPC had only one means of selling power which was to be used at the DOE facility, and that was through a contract with the certificate holder, UP&L. DOE and IPC could not have contracted for the power without UP&L because Idaho Power did not have a certificate to serve DOE.[2] Furthermore, Idaho Power

[2] I.C. § 61-527 states that "No public utility . . . shall henceforth exercise any right or privilege . . . without having first obtained from the commission a certificate that the public convenience and necessity require the exercise of such right or privilege . . . ."

did not (and does not) have any facilities in Butte County with which it could deliver electrical energy to DOE.

IPC's providing electrical energy which was ultimately delivered to DOE cannot be separated from the three-party agreement. Yet, that is exactly what the commission has done. Quoting the IPUC order:

> "The conflict in this case arises from the fact that Utah also has the legal authority to serve customers in Butte County at transmission levels. The question is therefore presented: When two utilities, both of whom have the legal right to serve a particular area, are vying to serve that area, what utility or utilities should be given the authority to do so? Under the facts of this case we find that the utility that is currently and satisfactorily serving the disputed area may continue to do so. We further find that, *the three-party agreement notwithstanding* Idaho Power is the utility that is currently serving DOE. The record is replete with evidence that Idaho Power shoulders the full responsibility providing DOE with its day in and day out energy and power requirements. We also find that Idaho Power is properly performing this service under a certificate that allows it to '[t]ransmit, interchange and *supply*' high voltage electric power and energy. We find that permission to supply high voltage power and energy encompassed the right to deliver and provide that power and energy to DOE, the only such actual or potential high voltage customer contemplated by the certificate." (Emphasis added.)

The foregoing statement ignores the commission's own findings of fact and the uncontradicted evidence in the record. Once again, Idaho Power only supplied electrical energy to DOE through the 1950 three-party agreement, as the commission found. Without that three-party agreement, Idaho Power could not have sold electrical energy to DOE, first, because it had no certificate to do so, and

secondly, it had no transmission lines or substation connecting to the lines of DOE. It deserves repeating that the Idaho Power system, including the interstate transmission line which was constructed pursuant to the five-party agreement and which was the basis for Idaho Power obtaining its certificate number 268, was never interconnected with DOE.

Perhaps the real reason motivating the commission's decision in this case can be found in the IPUC's statement:

> "Another factor *weighing in favor* of our decision is the public interest consideration of the effect of our decision on the rates the citizens of Idaho must pay. To decide in favor of Utah would place an unnecessary and burdensome rate increase on not only Idaho Power's Idaho customers, but also on Utah Power & Lights Idaho customers." (Emphasis added.)

This "cheaper rate" rationale is not supported in the record [3] and is inconsistent with our previous case law in

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[3] The IPUC assertion that to decide in favor of UP&L "would place an unnecessary and burdensome rate increase on . . . Utah Power & Light Company's Idaho customers," . . . is nowhere explained or supported in the record, and is questionable on its face. If the commission ruled in favor of Utah Power, as it should, the situation existing under the three-party agreement between IPC, UP&L and DOE would remain exactly as it presently is, and the rates of neither utility would be affected thereby. By ruling in favor of Idaho Power, either DOE will pay less, to the benefit of none of IPC's or UP&L's ratepayers, or IPC's revenues will be increased, which may in the future result in a rate reduction or, more probably, a lesser rate increase for Idaho Power. However, either of those two alternatives could result in a loss of several million dollars in revenues to UP&L and will no doubt require a corresponding increase in UP&L's rates to offset those revenue losses. Since UP&L's rates are substantially higher than Idaho Power's because of the differential between the hydro and steam generation base of the two utilities, the action of the IPUC in this case, if affirmed by the Court today, will only serve to exacerbate the difference between the rates of those two utilities.

Idaho. In Idaho Power & Light Co. v. Bloomquist, 26 Idaho 222 (1916), this Court stated:

> "Some will no doubt become incensed by the action of the public utilities commission when it refuses to permit a utility corporation to *duplicate* an amply sufficient plant to supply the needs of the community, because they think they may receive service at a little less rate; . . . . [T]he customer cannot insist on a less rate than would realize to the corporation a fair return on its legitimate investment. . . ." 26 Idaho at 251 (emphasis added).

Where a utility is serving an area based on a valid certificate, the fact that another utility might serve that area at a lower rate is not relevant. UP&L's right to serve Butte County cannot be taken from it absent a showing that it is not adequately serving the area certified to it. As we pointed out in Cambridge Telephone Co. v. Pine Telephone, *supra*, "An unserved area previously certified to a utility *may not be revoked when the certified utility is ready, willing and able to expend adequate service at reasonable rates.*" *Supra* at 879. The IPUC has not made findings based on this rule. UP&L has always been ready, willing and able to provide adequate service at reasonable rates set by the commission.

On review of a decision of the IPUC, this Court must determine whether the commission's findings are supported by substantial competent evidence, and whether the commission's conclusions are sustained by the facts which the record shows are supported by substantial competent evidence. Idaho Const. art. 5, § 9; I.C. § 61-629; Grindstone Butte Mutual Canal Co. v. Idaho Public Utilities Comm'n, 102 Idaho 175, 627 P.2d 804 (1981). For the reasons discussed above, the commission's findings are not supported by substantial competent evidence in the record and should be set aside.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF IDAHO

No. 16363

Rehearing No. 87RH-1

IN THE MATTER OF THE PETITION OF THE UNITED STATES DEPARTMENT OF ENERGY IDAHO OPERATIONS OFFICE FOR A DECLARATORY RULING. . . .

UTAH POWER & LIGHT COMPANY,
Appellant,
v.
THE IDAHO PUBLIC UTILITIES COMMISSION,
UNITED STATES DEPARTMENT OF ENERGY,
and IDAHO POWER COMPANY,
Respondents.

[Filed January 16, 1987]

ORDER DENYING PETITION FOR REHEARING

The Appellant having filed a PETITION FOR REHEARING on December 16, 1986 and supporting BRIEF on December 30, 1986 of the Court's Opinion released November 26, 1986; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is, DENIED.

Dated this 16th day of January, 1987.

By Order of the
Supreme Court

/s/ Frederick C. Lyon
Clerk

cc: Counsel of Record
Secretary-IPUC
Chairman-IPUC
West Publishing
Mead Data Central

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF IDAHO

No. 16363

IN THE MATTER OF THE PETITION OF THE UNITED STATES DEPARTMENT OF ENERGY IDAHO OPERATIONS OFFICE FOR A DECLARATORY RULING. . . .

UTAH POWER & LIGHT COMPANY,
Appellant,

v.

THE IDAHO PUBLIC UTILITIES COMMISSION,
UNITED STATES DEPARTMENT OF ENERGY,
and IDAHO POWER COMPANY,
Respondents.

[Filed January 16, 1987]

REMITTITUR

TO: PUBLIC UTILITIES COMMISSION OF THE STATE OF IDAHO.

The Court having announced its Opinion in this cause November 26, 1986, which has now become final; therefore,

IT IS HEREBY ORDERED that the Public Utilities Commission shall forthwith comply with the directive of the Opinion, if any action is required; and

IT IS FURTHER ORDERED that, inasmuch as no memorandum of costs on appeal was filed, such costs are hereby waived. No attorney fees awarded on appeal.

DATED this 16th day of January, 1987.

/s/ FREDERICK C. LYON
Clerk of the Supreme Court
STATE OF IDAHO

APPENDIX D

Office of the Secretary Service Date Nov. 29, 1985

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

Case No. U-1500-157

Order No. 20136

IN THE MATTER OF THE PETITION OF THE UNITED STATES DEPARTMENT OF ENERGY IDAHO OPERATIONS OFFICE FOR A DECLARATORY RULING. . . .

I. DECISION SUMMARY

For the substantial reasons stated herein we grant Department of Energy's petition and hereby declare that upon the termination of the "three-party contract" Idaho Power Company (IPCo or Idaho Power) has the authority to continue serving DOE [1] power and energy.

II. PROCEDURAL HISTORY

A. *Introduction—Case No. U-1500-157.*

On January 30, 1985 DOE initiated this proceeding by filing a Petition for a Declaratory Ruling. The petition initiated this Case No. U-1500-157. DOE, in its petition, requested that the Commission rule that upon

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[1] DOE has been variously referred to in these proceedings as INEL, AEC, The Department of Energy and DOE. In the interest of consistency we use only DOE to refer to all the above, including its predecessors in interest.

the termination of the existing DOE three-party contract with Idaho Power Company and the Utah Power & Light Company (Utah Power or UP&L) that:

> as between IPCo and UP&L, IPCo solely shall have all the rights, obligations and duties to serve electric supply to the INEL under the public utility laws of the State of Idaho.

B. *Case No. U-1009-147.*

On October 1, 1984, DOE petitioned the Commission for reconsideration of Order NO. 19101 in Case No. U-1009-137 (UP&L's last general rate case). Order No. 19101 set rates and charges for all of UP&L's Idaho customers, including DOE. DOE, in its Petition for Reconsideration, asserted that its firm demand rates should be set no higher than the firm demand rates charged to Beker and Monsanto.

On October 29, 1984 we granted DOE's petition. However, we found that to set rates and charges for the Department of Energy that are just and reasonable, the rates for all large contract customers of UP&L in Idaho must be examined. Therefore, on our own motion, we ordered DOE, Beker, Monsanto and UP&L to address the issue raised in DOE's Petition for Reconsideration.

We determined, on November 28, 1984 in Order No. 19270, that it was impossible to review the issues associated with setting rates for DOE, Beker, and Monsanto within the statutory deadline for reconsideration of Case No. U-1009-137. We therefore denied DOE's Petition for Reconsideration and opened a new docket, (Case No. U-1009-147), for the purpose of reviewing the issues raised in that petition.

Shortly after we opened Case No. U-1009-147 DOE filed the Petition for a Declaratory Ruling that initiated this case. As a result, we issued Order No. 19453 on

February 15, 1985. In Order No. 19453 the Commission stated that it would be premature to proceed with Case No. U-1009-147 in light of DOE's Petition for a Declaratory Ruling. The Commission found that if DOE is successful and leaves UP&L's system, the issues raised in Case No. U-1009-147 would be moot. We therefore held Case No. U-1009-147 in abeyance during the pendency of this case.

C. *Applicability of the Electric Supplier Stabilization Act.*

In Order No. 19440 we stated:

> Before [we] can reach the merits of DOE's petition, we must first determine whether we have jurisdiction over the subject matter. DOE avers that we have jurisdiction by virtue of our statutory authority under Idaho Code §§ 61-501 and 61-526 to regulate public utility service in the State of Idaho. However, we note that in the supporting documentation of DOE's petition, UP&L raises the issue of whether or not this matter properly belongs in district court under the "Electric Supplier Stabilization Act,". . .

We went on to order the parties to brief the issue of jurisdiction. After the jurisdictional issue was fully briefed, we issued Order No. 19531 on March 8, 1985. In that Order we concluded that we are vested with, at a minimum, concurrent jurisdiction with Idaho District Courts to decide the substantive issues presented in DOE's Petition for a Declaratory Ruling.

D. *UP&L's Motion to Dismiss.*

On March 28, 1985 UP&L filed a Motion to Dismiss DOE's Petition for a Declaratory Ruling. UP&L asserted that DOE's Motion is premature because it does not present a real controversy based on existing facts. UP&L

asserted that if DOE is dissatisfied with the three-party agreement, it should terminate it and thereby create controversy over which this Commission would have jurisdiction.

We ruled against UP&L. We found that the Department of Energy's status as an electric customer would be threatened if it exercised its right to terminate the three-party agreement. In denying UP&L's motion to dismiss we stated that DOE must have assurance as to what the consequences of terminating the contract would be. We concluded that the issuance of a declaratory judgment is proper and is supported by Idaho Law.

E. *The Hearing*

After extensive discovery the parties prefiled their direct and rebuttal testimonies. A tour of the Scoville and Antelope substations on the DOE site was conducted by DOE on August 14, 1985. The Commission and all parties to the proceedings participated in the tour. On August 15, 1985 a public hearing was held at Idaho Falls and appearances were made by the following:

APPEARANCES

For the Petitioner:

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-and-

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For Idaho Power Co.:	EVANS, KEANE, KOONTZ, BOYD & RIPLEY by LARRY D. RIPLEY, Esq. Idaho First Plaza-Suite 1701 101 South Capital Blvd. Boise, Idaho 83702 -and- RONALD WILLIAMS, Esq. P.O. Box 70 Boise, Idaho 83707
For UP&L:	THOMAS W. FORSGREN, Esq. 310 Utah Power & Light Bldg. 1407 West North Temple Salt Lake City, Utah 84116 -and- MERRILL & MERRILL by W. F. MERRILL, Esq. and STEPHEN S. DUNN, Esq. P.O. Box 991 Pocatello, Idaho 83201
For Beker Industries:	ELAM, BURKE & BOYD by RICHARD C. MELLON, Esq. 1010 First Interstate Bank Boise, Idaho 83702
For the Staff:	PETER J. RICHARDSON, Esq. Deputy Attorney General 472 West Washington Boise, Idaho 83720

III. HISTORY OF SERVICE TO DOE

The area now known as the Idaho National Energy Laboratory was first provided electrical service in 1943 by Utah Power & Light. Tr. 261. In that year UP&L extended electrical service from the village of Arco to the Naval Proving Grounds (forerunner of the INEL site). In 1950 the Atomic Energy Commission entered into a 100 kilowatt (kw) electric supply contract with UP&L to assure continued electrical supply to the reactor testing station after the U.S. Navy ended its work at the Navy Proving Grounds. Tr. 64. See stipulated Exhibit No. 601.2. The first "three-party" supply contract was entered into on September 15, 1950. This contract was executed by the United States Atomic Energy Commission as "buyer" and "party of the first part" and by Idaho Power Company as "seller" and "party of the second part" and Utah Power & Light Company as "party of the second part to the extent hereinafter provided." See stipulated Exhibit 601.3 part 0.1. The 1950 agreement called for the provision of up to 20,000 kilowatts of electricity by Idaho Power to DOE. That agreement said at page 4:

> Buyer (DOE) will look to seller (Idaho Power) for, and seller will supply or stand ready to supply, the full amount of power requirements of buyer as specified in this agreement.

The 1950 agreement also called for Utah Power & Light to construct and maintain a 132 KV transmission line from its Goshen substation to DOE's Scoville substation.

The 1950 agreement was replaced in 1957 by a new power sales agreement between Utah Power, Idaho Power and DOE. The new agreement called for the delivery of 40,000 kilowatts to DOE by Idaho Power. That agreement stated:

> Seller (Idaho Power), in cooperation with Utah Company, shall sell and deliver to buyer . . . all elec-

tric power required by buyer for the operation of NRTS (National Reactor Testing Station) up to 40,000 kw.

Also in 1957 Utah Power and Idaho Power entered into a separate agreement in which the relative responsibilities of the two utilities were assigned and a pool account established for division of revenues. The 1957 agreement has been renewed on several occasions and is still in force as modified by intervening ratemaking Orders of this Commission.

IV. THE ABILITY OF EACH UTILITY TO SERVE THE DOE LOAD

1. *The Physical Facilities.*

DOE's Idaho National Engineering Laboratory encompasses 980 square miles. The site is located in the following southeastern Idaho counties: Clark, Bingham, Bonneville, Butte, and Jefferson. The location and ownership of the physical facilities to serve the DOE site are not in dispute. The parties agreed to Stipulated Exhibit No. 602, which shows the location of transmission lines and substations, the respective ownership rights of each and the capacity of the transmission lines.

2. *Generation Capacity and Dispatch Capability.*

All parties agree that Idaho Power would not need to make a change in its generation or plant dispatch were it to become the sole supplier to DOE. This is true because Idaho Power Company presently meets the entire commercial DOE load. Furthermore, Idaho Power plans to continue to meet the full DOE load into the foreseeable future. The generation capacity required to serve the DOE load is factored into Idaho Power's load forecasts and its long-term generation capacity requirements. Finally, Idaho Power dispatches its generators to meet the full DOE load.

DOE required 33.7 MW of non-coincident load and 22.1 MW of average monthly coincident load in 1981. Tr. 156. Lawrence Crowley, Idaho Power witness, asserted that if Idaho Power becomes sole supplier for DOE the status quo would be maintained insofar as Idaho Power's load and resources planning and revenue requirements are concerned.

Dean Bryner, witness for UP&L, asserts that UP&L can now, and will be able to in the future serve all of the DOE load. Mr. Bryner testified that UP&L will not have to install new generating capacity in order to serve the DOE load. Nor, according to Mr. Bryner, will UP&L have to install such capacity in 1989 when UP&L forecasts that it will no longer have excess capacity. Tr. 423. In terms of dispatch capability, Joseph Comish, for Utah Power, asserts that it would take Utah less than two minutes to deactivate the schedule of energy from Idaho Power and to begin serving the DOE load. Indeed, according to Comish, including the DOE load in Utah's day-to-day and hour-to-hour load planning would be less of a problem than forecasting the normal load shifts caused by weather changes. Tr. 342.

All parties agree, and we hereby find, that UP&L and Idaho Power have sufficient existing capacity and dispatch capability to serve DOE.

Although there are no contentions that either company lacks the generation capacity or dispatch capability to provide adequate service to DOE, there were serious disagreements as to the reliability of the respective utilities' *transmission* capability.

3. *Transmission Capability.*

Power is delivered to DOE's Scoville substation over two 138 KV UP&L owned transmission lines. These two 138 KV transmisison lines originate at UP&L's Antelope substation. Idaho Power posits that its electricity is

"wheeled" by UP&L over these two 138 KV transmission lines to serve the Scoville substation. Tr. 144. Mr. Bryner, for UP&L, disagree with DOE's characterization of the delivery of electrical energy over its two 138 KV lines as "wheeling". Mr. Bryner asserted that the two-party agreement between Idaho Power and Utah Power & Light makes no reference to "wheeling". Rather, according to Mr. Bryner, the contract specifies the means by which the respective assignments and responsibilities of Idaho Power and Utah Power for the production, and delivery by Utah Power, of power and energy to DOE. UP&L characterizes its obligation under the contract as one of joint responsibility for the production of energy for DOE. But UP&L emphasizes that it has the sole responsibility for the *delivery* of energy to DOE. See Tr. 418.

Idaho Power connects to UP&L's Antelope substation through its Brady-Antelope leg of the AMPS intertie line. The AMPS line is a regional intertie transmission line connecting UP&L, Idaho Power, Montana Power and Pacific Power & Light.[2] The Antelope substation was built by UP&L to facilitate its access to the AMPS line. When UP&L built the Antelope substation, it rerouted its Goshen-Scoville transmission line through the Antelope substation. The distance between UP&L's Antelope substation and DOE's Scoville substation is approximately one-half mile. That one-half mile is traversed by two 138 KV transmission lines that are owned by UP&L. To serve DOE as its sole customer Idaho Power proposes the following options:

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[2] We take this opportunity to commend Utah Power and Idaho Power for their role in the creation of a regional intertie of the magnitude of the AMPS line. They have created a situation whereby four Northwest utilities (the two of them and Pacific Power & Light and Montana Power also have access to this line) have the ability to interconnect, thereby providing direct and ongoing benefits to all concerned. Such regional cooperation is to be encouraged.

1. Wheel its power through UP&L's Antelope substation over UP&L's transmission lines to Scoville.

2. Purchase UP&L's Scoville-Antelope transmission lines.

3. Maintain the current "informal interchange arrangement".

4. If the above three options fail, build a new transmission line from the Antelope substation to the Scoville substation parallel to UP&L's two transmission lines.

Tr. 146.

Mr. James Taylor, President of Utah Power & Light Company, stated that no Utah Power & Light facilities would be sold to Idaho Power Company or to the Department of Energy. Tr. 454.

The parties argued at great length over what a proper wheeling charge would be were Idaho Power to wheel its electricity over UP&L's one-half mile of 138 KV transmission line. Any wheeling arrangement between the two utilities would have to be approved by the Federal Energy Regulatory Commission. That body would also determine the wheeling rate. Because this matter is outside the scope of the IPUC's jurisdiction, the parties' arguments are academic.

We decline to comment on Idaho Power's four proposed options for bridging the ½ mile gap between Antelope and Scoville. That issue is not before the Commission. However, we encourage Utah Power, and Idaho Power and DOE to work out an amicable arrangement in this area.

Conceptually, power is delivered to the Scoville substation through two different routes. The first route is the contract route. The 1957 contract contemplates that the power flow to DOE would be over UP&L's Goshen-Antelope 132 KV line. That contract provides:

4.6 *Power Supply to Utah Company's loads in Arco Area*

(a) GOSHEN-NRTS (Goshen-Scoville, note Goshen-Antelope) line shall be *used primarily (1) for the transmission of electric power required by Buyer (DOE) and* (2) for the transmission of up to 6,000 KVA of electric power to serve Utah Company's customers in the general vicinity of Arco, Idaho.

(Exhibit 601.4 § 4.6(e), emphasis provided by Utah)

Addressing the issue of how power is contractually delivered to DOE Dean Bryner asserted that:

> The point of delivery for all power supplied to INEL by UP&L is at the INEL Scoville substation. The point of delivery for power supplied by IPC[o] for INEL is at UP&L's Goshen substation, American Falls, Pocatello and Blackfoot points of interconnection between UP&L and IPC[o]. UP&L then has the responsibility to provide, from its own resources and from the aforementioned points of delivery, the transmission and substation facilities for the total supply to INEL point of delivery at Scoville. Tr. 413

On the question of how power is *physically delivered* to the Scoville substation DOE witness Powell conceded that DOE's power is delivered over UP&L transmission facilities. Tr. 50. In addition, UP&L witness James Tucker stated that the physical operation of the interconnected transmission network will be essentially the same whether the power is supplied by Idaho Power or Utah Power. Tr. 375. Mr. Tucker noted that:

> With the construction of the AMPS line and Idaho Powers Brady-Antelope leg of that line the utilities have become integrated. As a result, power flow studies indicate that "inadvertent" flows of energy

> to DOE's Scoville substation can be found on all lines leading to the Antelope substation. The primary flow pattern is over the Goshen-Antelope UP&L owned line and the Brady-Antelope Idaho Power owned line. Tr. 96.

The contract calls for the delivery of power to DOE over UP&L's Goshen-Antelope transmission line. However, in reality, power flows about equally over UP&L's Goshen-Antelope line and IPCo's Brady-Antelope line.

V. *REVENUE IMPACTS*

DOE's total annual power cost is approximately $4.1 million. Of that amount $1.3 million is paid to UP&L for a readiness to serve 11 MW of firm power. Tr. 207. The groups of customers that will be affected by our decision are: Utah Power & Light's other Idaho customers, Idaho Power Company's other customers, DOE, and UP&L's customers in other jurisdictions. A complicating factor is that Utah Power & Light does not have a published schedule of rates for service to DOE. Therefore, the parties have taken two different approaches to estimate what UP&L's charges to DOE would be were it the sole supplier. The Department of Energy estimates its potential bill from UP&L using UP&L's General Service Schedule (Schedule 13). UP&L, on the other hand, estimates its potential bill to DOE patterned on the rates it charges Beker Industries. The difference in the two approaches is profound. Using Schedule 13, DOE's cost of power would increase $8.5 million, under Beker's rates that increase would be $1.7 million. UP&L witness Dunn pointed out that use of Schedule 13 is totally inappropriate to estimate cost to DOE. He noted that Schedule 13 is not intended to apply to special contract customers such as Beker and DOE. Tr. 270.

We find the following table to be a reasonable approximation of the various revenue impacts of DOE's Petition.

TABLE

EXCLUSIVE SERVICE BY . . .	DOE	DOLLAR IMPACT ON IPCO CUSTOMERS [1] OTHER THAN DOE	DOLLAR IMPACT ON UP&L'S IDAHO [2] CUSTOMERS OTHER THAN DOE
IPCO	Rate Decrease of $1,300,000	No Change	Rate Decrease of $672,000
UP&L [3]	Rate Increase of $1,700,000	Rate Increase of $2,750,000	Rate Decrease of $267,000

[1] Ignores minimal impact on IPCo's customers outside Idaho.

[2] Assumes 12 CP allocation for UP&L

[3] Assumes rate charge to DOE by UP&L based on Beker contract rates, see Tr. 270. (Results in much lower rate to DOE than under UP&L's Schedule 13.)

VI. CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

1. *UP&L's Certificates.*

UP&L has valid general Certificates of Public Convenience and Necessity for all five counties in which DOE operates. Those counties and the dates of UP&L's certificates are:

Clark County	1940
Bingham County	1917
Bonneville County	1922
Butte County	1929
Jefferson County	1917

All of UP&L's Certificates of Public Convenience and Necessity for the five county area are general grants of

authority. That is, UP&L's Certificates speak to the provision of general electric service to all who request it. No certificate describes the service territory of UP&L by metes and bounds.

2. *IPCo's Certificate.*

Idaho Power also has valid Certificates of Public Convenience and Necessity for all five counties in which DOE operates. Those counties and the dates of IPCo's certificates are:

Clark County	1940
Bingham County	1923
Bonneville County	1940
Butte County	1969*
Jefferson County	1940

* (See discussion in § VII)

Idaho Power's Certificates, with the notable exception of Butte County, are also very general grants of authority. Those certificates speak to the provision of general electric service for "light, heat, power and other purposes."

VII. BUTTE COUNTY

A. *Introduction.*

Butte County contains *the* point of delivery for energy to DOE. Because Idaho Power's Certificate of Public Convenience and Necessity for Butte County is not general, but limited, it assumed a role of central importance to the parties. That certificate and its authorizing Order are attached hereto as Appendix A.

Idaho Power Company's Certificate for Butte County does not follow the pattern found in other electric utility certificates because it contains a metes and bounds description.

1. *Idaho Power's Arguments.*

Idaho Power points to the following language contained in Amended Certificate No. 268 in support of its argument that it has the right to serve customers in Butte County at transmission voltage levels.

> [This] certificate . . . [is] limited to the transmission, interchange and supply of high voltage electrical power and energy.

According to Idaho Power it was not necessary for it to obtain a Certificate of Public Convenience and Necessity from the Idaho Commission to build a transmission line across Butte County. The Company argues that utility transmission interconnections and accompanying public interest determinations are under the exclusive jurisdiction of the Federal Energy Regulatory Commission (then, the Federal Power Commission). We disagree with the Company's argument that there is federal preemption over the issuance of certificates for transmission lines. Nevertheless, our disagreement does not invalidate our finding that the purpose of the amendment was to allow Idaho Power to serve a high-voltage customer—DOE. It is necessary for Idaho Power to have a certificate for Butte County to provide DOE with *retail transmission-level supply* regardless of state-federal transmission law.

2. *UP&L's Argument.*

It is UP&L's contention that Amended Certificate No. 268 gives Idaho Power no authority to serve any load in Butte County. UP&L refers to Certificate No. 268 as the "AMPS Line Certificate." In support of its contention that Amended Certificate No. 268 is for the sole purpose of granting IPCo authority to construct and maintain the AMPS transmission line, UP&L makes the following points.

First, the caption for Amended Certificate No. 268 states in a parenthetical phrase that it is for "transmission line only". It is interesting to note that UP&L relies on the very same language from Amended Certificate No. 268 as did IPCo:

> [T]he said Certificate of Convenience and Necessity be limited to the transmission, interchange and supply of high voltage electrical power and energy.

UP&L asserts that the words "limited to" were intended to prevent IPCo from conducting any electric business in Butte County other than merely traversing it with its transmission lines.

UP&L asserts that the AMPS line's only supply function is as an interconnection for the supply of power among Montana Power, Idaho Power and Utah Power & Light. In support of this contention UP&L points to the language in Amended Order No. 9293 (see Appendix A), dated April 14, 1963. That Order amended Certificates No. 268 to reflect a change in the AMPS line interconnection point with Idaho Power. In addition, Amended Order No. 9293 held that the purpose of Amended Certificate No. 268 was to allow Idaho Power Company to construct "a 230 KV transmission line *across* Butte County, Idaho." (emphasis UP&L's) UP&L asserts that the word "across" means that Idaho Power is not allowed to serve customers in Butte County.

Second, UP&L asserts that the restrictive language in Amended Certificate No. 268 prohibits IPCo from serving customers in Butte County. UP&~~L~~ notes that Amended Certificate No. 268, granted in 1969, contains a metes and bounds description of Idaho Power's right to construct its 230 KV AMPS line. UP&L contrasts that specific description with the description found in its own Certificate of Public Convenience and Necessity to serve Butte County. That Certificate grants UP&L the authority to:

> Furnish [electrical energy] to the Wilbert Mining Company in Butte County, Idaho, and to other customers in Butte County.

Third, Utah claims that Idaho Power's assertion that its Butte County Certificate allows for the sale and supply of transmission voltage electrical energy in that county is incongruous in light of Idaho Power's Application for that Certificate.[3] Idaho Power's Application for Amended Certificate No. 268 stated that the Butte County Certificate and the line constructed under it would not "be available for or dedicated to, the furnishing of general service along its route" nor would it "compete with any other public utility, corporation or person." See Post Hearing Brief of UP&L at p. 15. In addition, Idaho Power's Application clearly stated that it had no Certificate of Public Convenience and Necessity to serve customers in Butte County.

We disagree. It would be an effort in futility to grant a Certificate of Public Convenience and Necessity instructing a utility to not serve a particular area. Certificates are grants of authority. When the Commission issues a certificate that is "limited to the transmission interchange and supply etc. . . .," it is *granting* the authority to do these things. While Idaho Power's certificate gave it no general grant of authority to serve all customers in Butte County, it nevertheless allowed it to *supply* power and energy at the transmission level, and there was one customer for whose benefit this was obviously done: DOE.

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[3] UP&L attached photo copies of Idaho Power Company's Application for Amended Certificate No. 268 to its Post Hearing Brief. Because that application was not introduced into evidence in this matter, UP&L requests that we hereby take official notice of it. Therefore, pursuant to our authority under IDAPA 31.A Rule 25.5, we take official notice of Idaho Power's Application for Amended Certificate No. 268.

3. *DOE's Argument.*

DOE downplays the significance of Certificates of Public Convenience and Necessity. According to DOE, Certificates of Public Convenience and Necessity are non-exclusive and non-permanent. It asserts that Certificates are not property rights and are therefore at all times revokable. DOE's position is, in essence, that the Public Utilities Commission revoked Utah's right to serve DOE in 1950 when it approved the first three-party contract. See Post Hearing Brief of Department of Energy at p. 20.

In support of its contention that the Commission may allow one utility to serve an area previously certificated by another utility DOE cites the Idaho Supreme Court case of *McFayden v. Public Utilities Consolidated Corp.*, 50 Idaho 651, 299 P. 671. In *McFayden* the Commission allowed a utility to supply natural gas in an area already served by a company supplying manufactured gas. Because we find that Idaho Power has a valid certificate to serve DOE and that Idaho Power is in fact serving DOE we need not reach DOE's arguments in this area.

DOE next avers that, regardless of which utility has a valid certificate, the public interest requires that Idaho Power and not Utah Power & Light provide electrical service to DOE. Utah responds that public interest factors such as cost are to be determined only when two public utilities are competing to serve a previously uncertificated area. Utah Power & Light quotes one of the earliest Idaho Supreme Court cases on this subject, *Idaho Power Light Company v. Bloomquist*, 26 Idaho 222 (1916). The Supreme Court in Bloomquist held that:

> Someone will no doubt become incensed by the action of the Public Utilities Commission when it refuses to permit a utility corporation to duplicate an amply sufficient plant to supply the needs of the community, because they think they may receive service at a

> little less rate; . . . The consumer cannot insist on a less rate than would realize to the corporation a fair return on its legitimate investment . . .

We are in general agreement with UP&L that when there is an existing utility already serving in the field, the wishes of the consumer are, for the most part, irrelevant. Where UP&L misses the mark is in failing to note that IPCo is currently the supplier and is therefore *already* occupying the field. In addition, it is doing so under the authority of a valid Certificate of Public Convenience and Necessity.

We would therefore agree with DOE that, on the limited facts of this case, the public interest factors weigh heavily in favor of Idaho Power. This finding is grounded primarily on DOE's evidence on the cost to Idaho ratepayers of not allowing Idaho Power to continue to be the sole supplier. See Tr. 482. But we need not and do not rest our decision on that ground—we might resort to such factors as a "tie-breaker" if everything else were equal. But other factors are not equal—Idaho Power has a right to serve DOE under its certificate regardless of public interest considerations.

B. *Waiver of Certificate by UP&L.*

Idaho Power asserts that UP&L has waived its right to serve DOE under its Butte County Certificate by virtue of its contractual agreements with Idaho Power and DOE for provision of electrical energy to DOE by Idaho Power. In support of this contention Idaho Power notes that this Commission has, on numerous occasions, found the contractual arrangement between Idaho Power, Utah Power and DOE to be reasonable.

UP&L in response claims that it was entitled to enter into a special contract allowing Idaho Power Company to assist in serving a UP&L customer in UP&L's certified area. UP&L adamantly denies ever having waived

its rights to its certificated area in Butte County. In addition, UP&L asserts that by approving the three-party contract the Commission was simply approving the rates contained therein without ruling on the issue of which utility has right to serve on termination of the three-party contract.

Idaho Power and DOE argue that UP&L has waived its obligations and rights under that certificate by entering into the service contract with Idaho Power. Utilities are not, however, allowed to simply "waive" their service obligations under a Certificate of Public Convenience and Necessity. Were it possible to simply waive one's obligations under a Certificate of Public Convenience and Necessity, the Commission's ability to enforce such certificates would be severely limited. Our decision is not based upon a waiver theory.

CONCLUSIONS

We find that Idaho Power has a valid Certificate of Public Convenience and Necessity to serve customers in Butte County at transmission levels.

We note here that the contractual arrangements among the various parties are not dispositive of this case. Rather, we base our decision on IPCo's Certificate No. 268 and the fact that Idaho Power is currently *serving* the entire DOE load.

The conflict in this case arises from the fact that Utah also has the legal authority to serve customers in Butte County at transmission levels. The question is therefore presented: When two utilities, both of whom have the legal right to serve a particular area, are vying to serve that area, which utility or utilities should be given the authority to do so? Under the facts of this case we find that the utility that is currently and satisfactorily serving the disputed area may continue to do so. We further find that, the three-party agreement not withstanding,

Idaho Power is the utility that is currently serving DOE. The record is replete with evidence that Idaho Power shoulders the full responsibility of providing DOE with its day in and day out energy and power requirements. We also find that Idaho Power is properly performing this service under a certificate that allows it to "transmi[t], interchange and *supply*" high voltage electric power and energy. We find that permission to "supply" high voltage power and energy encompassed the right to deliver and provide that power and energy to DOE, the only such actual or potential high voltage customer contemplated by the certificate.

Another factor weighing in favor of our decision is the public interest considerations of the effect of our decision on the rates the citizens of Idaho must pay. To decide in favor of Utah would place an unnecessary and burdensome rate increase on not only Utah Power's Idaho customers, but also on Utah Power and Light Company's Idaho customers.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

I

Idaho Power Company is a public utility subject to the jurisdiction of the Idaho Public Utilities Commission pursuant to Idaho Code, Title 61.

II

Utah Power & Light Company is a public utility subject to the jurisdiction of the Idaho Public Utilities Commission pursuant to Idaho Code, Title 61.

III

Utah Power & Light Company has a valid general Certificate of Public Convenience and Necessity to serve customers in Butte County, Idaho.

IV

Idaho Power Company has a valid limited Certificate of Public Convenience and Necessity to supply power and energy to serve customers at transmission voltage levels along a metes and bounds description in Butte County, Idaho.

V

Idaho Power Company has a valid Certificate of Public Convenience and Necessity to serve the Department of Energy, Idaho Operations Office, at transmission level delivery.

VI

Idaho Power Company is the sole utility providing DOE with electrical power and energy.

VII

Idaho Power is currently providing satisfactory service to its customer, the Department of Energy, in Butte County, Idaho.

ORDER

IT IS THEREFORE ORDERED that the Department of Energy's petition that is the subject of this Order be and hereby is granted to the extent that we find Idaho Power has the right to serve its facility by delivery of transmission level power and energy in Butte County.

IT IS FURTHER ORDERED that upon the termination of the three-party contract between Idaho Power, Utah Power & Light, and the Department of Energy, Idaho Power Company shall have the right to continue to serve the Department of Energy at transmission voltage levels.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order)

or in interlocutory Orders previously issued in this Case No. U-1500-157 may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in this Case No. U-1500-157. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See Idaho Code § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho, this 27th day of November, 1985.

/s/ Perry Swisher
PERRY SWISHER
President

/s/ Conley Ward, Jr.
CONLEY WARD, JR.
Commissioner

/s/ Richard S. High
RICHARD S. HIGH
Commissioner

ATTEST:

/s/ Myrna J. Walters
MYRNA J. WALTERS
Secretary

APPENDIX "A"

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

Case No. U-1006-67

Amended Certificate No. 268

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY (FOR TRANSMISSION LINE ONLY) IN POWER, BINGHAM AND BUTTE COUNTIES IN THE STATE OF IDAHO

IT IS HEREBY CERTIFIED that the public convenience and necessity requires and will require the Idaho Power Company, its successors and assigns to construct, own, maintain and operate a 230 KV transmission line commencing at the NW¼ of the NE¼ of Section 6, T2N, R30E, B.M., Butte County, Idaho, and extend a distance of approximately sixty (60) miles in a southerly direction through Butte, Bingham and Power Counties, to the NW¼ of the NW¼ of Section 22, T4S, R30E, B.M., Power County, Idaho and to exercise the rights and privileges granted or which may be granted by any franchise to be obtained from said Butte County, and by existing franchises in Power and Bingham Counties; and that said certificate of convenience and necessity be limited to the transmission, interchange and supply of high voltage electrical power and energy.

This Certificate is predicated upon the Findings and Order of Amended Order No. 9293 in the above entitled matter, made and entered this 14th day of April, 1969, to which reference is hereby made.

DATED at Boise, Idaho this 14th day of April, 1969.

/s/ Ralph H. Wickberg
RALPH H. WICKBERG
President

/s/ Harry L. Nock
HARRY L. NOCK
Commissioner

/s/ J. Burns Beal
J. BURNS BEAL
Commissioner

[SEAL]

ATTEST:

/s/ Marilyn Bourner
Secretary

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

Case No. U-1006-67

Amended Order No. 9293

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY (FOR TRANSMISSION LINE ONLY) IN POWER, BINGHAM AND BUTTE COUNTIES IN THE STATE OF IDAHO

By its Order No. 9293, dated February 3, 1969, this Commission granted a certificate of public convenience and necessity, No. 268, to the Idaho Power Company for the construction of a 230 KV tranmission line across Butte County, Idaho.

On April 8, 1969 the Company filed a petition to amend Order No. 9293 and Certificate No. 268 by deleting therefrom the words "commencing in the SW¼ of the NE¼, Section 15, T3N, R29N, B.M., Butte County, Idaho" to read as follows: "commencing at the NW¼ of the NE¼ of Section 6, T2N, R30E, B.M., Butte County, Idaho."

FINDINGS

I.

THAT the petition to amend Order No. 9293 and Certificate No. 268 by deleting therefrom the phrase "commencing in the SW¼ of the NE¼, Section 15, T3N, R29E, B.M., Butte County, Idaho," and substituting therefore the following phrase: "commencing at the

NW¼ of the NE¼ of Section 6, T2N, R30E, B.M., Butte County, Idaho," should be granted.

ORDER

IT IS THEREFORE ORDERED that Commission Order No. 9293 and Certificate No. 268 should be, and the same are hereby amended as set forth in Finding No. I herein.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho, this 14th day of April, 1969.

/s/ Ralph H. Wickberg
President

/s/ Harry L. Nock
Commissioner

/s/ J. Burns Beal
Commissioner

[SEAL]

ATTEST:

/s/ Marilyn Bourner
Secretary

APPENDIX E

Office of the Secretary
Service Date Jan. 9, 1986

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

Case No. U-1500-157

Order No. 20207

IN THE MATTER OF THE PETITION OF THE UNITED STATES DEPARTMENT OF ENERGY IDAHO OPERATIONS OFFICE FOR A DECLARATORY RULING

On January 30, 1985, DOE petitioned for a declaratory ruling that Idaho Power Company rather than Utah Power & Light has the exclusive right to serve it.

In response to DOE's petition, we issued Order No. 19440 asking the parties to brief the issue of whether the Commission could *properly exercise jurisdiction over the subject matter* of DOE's petition in light of the Electric Supplier Stabilization Act. (*Idaho Code* § 61-332 et seq.)

In Order No. 19531, issued on March 8, 1985, we found that the Commission is vested with, at a minimum, concurrent jurisdiction with Idaho District Courts to decide the substantive issues presented by DOE's petition for a declaratory ruling.

On March 28, 1985, Utah Power & Light filed a motion to dismiss DOE's petition. In its Motion UP&L asserted that DOE's petition is improper and premature in that it does not present a real controversy based on existing facts. In denying UP&L's motion to dismiss we stated, in Order 19657 on May 3, 1985, that DOE must have assur-

ance from the Commission as to what the consequences would be of its terminating its argreement with Utah Power & Light and with Idaho Power Company (the 'three-party agreement'). We concluded that the issuance of a declaratory ruling is proper and is supported by Idaho law.

Also in its Motion to dismiss UP&L requested that, should we hear DOE's petition, we apply the provisions of the Electric Supplier Stabilization Act rather than the provisions of *Idaho Code* Section 61-526 in resolving this dispute. In response, we held that:

> We . . . find that the Electric Supplier Stabilization Act is inapplicable to the Department of Energy's petition for declaratory ruling. Utah's arguments that the Electric Supplier Stabilization Act is applicable are based primarily on the anomaly that, other than the Stabilization Act, no provision in the Public Utilities law specifically deals with competition between electric utilities. However the general provisions of the *Idaho Code* dealing with certificates of public convenience and necessity provide adequate legal authority to resolve the issues raised by the Department of Energy's petition for a declaratory ruling. See generally *Idaho Code* §§ 61-501, 526, 528.

On August 15, 1985 a public hearing was held at Idaho Falls in which all parties participated.

On November 27, 1985, we issued Order No. 20136. In that Order we stated:

> for the substantial reasons stated herein we grant Department of Energy's petition and hereby declare that upon termination of the "three-party contract" Idaho Power Company has the authority to continue serving DOE power and energy.

On December 18, 1985, UP&L timely petitioned for Reconsideration of Order No. 20136. Utah Power & Light

specifically objected to the following ultimate Findings of Fact and Conclusions of Laws contained in that Order:

IV

Idaho Power Company has a valid limited Certificate of Public Convenience and Necessity to supply power and energy to serve customers at transmission voltage levels along a metes and bounds description in Butte County, Idaho.

V

Idaho Power Company has a valid Certificate of Convenience and Necessity to serve the Department of Energy, Idaho Operations Office, at transmission level delivery.

VI

Idaho Power Company is the sole utility providing DOE with electrical power and energy.

VII

Idaho Power is currently providing satisfactory service to its customer, the Department of Energy, in Butte County, Idaho.

After careful review of the petition for reconsideration we have determined to affirm our Order No. 20136 in all respects. The petition for reconsideration is therefore denied in its entirety.

The Department of Energy filed a Motion to Dismiss and/or Deny and Brief in Opposition to UP&L's Petition for Reconsideration. Because we have denied UP&L's petition, it is not necessary for us to address the issues raised by DOE in its Motion.

ORDER

IT IS THEREFORE ORDERED that Utah Power & Light's petition for reconsideration be and hereby is denied.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this Case No. U-1500-157 may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho, this 9th day of January, 1986.

/s/ Perry Swisher
President

/s/ Conley Ward, Jr.
Commissioner

/s/ Richard S. High
Commissioner

ATTEST:

/s/ Myrna J. Walters
Secretary

APPENDIX F

W. F. Merrill
Stephen S. Dunn,
MERRILL & MERRILL, CHARTERED
P.O. Box 991
Pocatello, Idaho 83204
Telephone: (208) 232-2286
Attorneys for Appellant

IN THE SUPREME COURT OF THE
STATE OF IDAHO

Supreme Court No. 16363

IN THE MATTER OF THE PETITION OF THE UNITED STATES DEPARTMENT OF ENERGY IDAHO OPERATIONS OFFICE FOR A DECLARATORY RULING

Notice of Appeal to the Supreme Court
of the United States

UTAH POWER & LIGHT CO.,
Appellant,

vs.

IDAHO PUBLIC UTILITIES COMMISSION,
UNITED STATES DEPARTMENT OF ENERGY, and
IDAHO POWER COMPANY,
Appellees.

[Filed April 13, 1987]

NOTICE IS HEREBY GIVEN THAT Utah Power & Light Company, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Idaho

("Idaho Supreme Court"), entered in this action on November 26, 1986, as 1986 Opinion No. 154 and the Order of the Idaho Supreme Court and Remittitur issued thereon, each dated January 16, 1987, denying Appellant's Petition for Rehearing, which affirmed Order No. 20136 of the Idaho Public Utilities Commission dated November 27, 1985, with Service Date of November 29, 1985, in Case No. U-1500-157, granting the Idaho Power Company the right solely to serve the United States Department of Energy by delivery of transmission level power and energy to the Department of Energy Idaho National Engineering Laboratory ("INEL").

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED this 13th day of April, 1987.

MERRILL & MERRILL, CHARTERED

By /s/ W. F. Merrill
W. F. MERRILL
Residence: Pocatello, Idaho

By /s/ Stephen S. Dunn
by Wesley F. Merrill
STEPHEN S. DUNN
Residence: Pocatello, Idaho

/s/ Thomas W. Forsgren
THOMAS W. FORSGREN
Utah Power & Light Co.
P.O. Box 899
Salt Lake City, Utah 84110

Counsel for Appellant

AFFIDAVIT OF SERVICE

STATE OF IDAHO)
) : ss.
COUNTY OF BANNOCK)

The undersigned, being first duly sworn, deposes and says, that on the 13th day of April, 1987, I caused to be mailed by United States mail, first class postage prepaid, a true and correct copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES TO:

IDAHO PUBLIC
UTILITIES COMMISSION

Myrna J. Walters, Secretary
Idaho Public Utilities Commission
Statehouse
Boise, Idaho 83720

Peter J. Richardson
Idaho Deputy Attorney General
Idaho Public Utilities Commission
Statehouse
Boise, Idaho 83720

UNITED STATES
DEPARTMENT OF ENERGY

Solicitor General
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IDAHO POWER COMPANY

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and
c/o Idaho Power Company
P.O. Box 70
Boise, Idaho 83707

Ronald D. Williams
Idaho Power Company
P.O. Box 70
Boise, Idaho 83707

I further state that all parties required to be served have been served.

/s/ Wesley F. Merrill

Subscribed and sworn to before me, the undersigned notary public, on this 13th day of April, 1987.

My commission expires:
April 29, 1991

[SEAL]

/s/ Ellen B. McCashland
Notary Public
Residing at:
Pocatello, Idaho

APPENDIX G

IDAHO CODE

Section 61-526

Certificate of convenience and necessity.—No Street railroad corporation, gas corporation, electrical corporation, telephone corporation or water corporation, shall henceforth begin the construction of a street railroad, or of a line, plant, or system or of any extension of such street railroad, or line, plant, or system, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction: provided, that this section shall not be construed to require such corporation to secure such certificate for an extension within any city or county, within which it shall have theretofore lawfully commenced operation, or for an extension into territory whether within or without a city or county, contiguous to its street railroad, or line, plant or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it necessary in the ordinary course of its business: and provided further, that if any public utility in constructing or extending its lines, plant or system, shall interfere or be about to interfere with the operation of the line, plant or system of any other public utility already constructed, or if public convenience and necessity does not require or will require such construction or extension, the commission on complaint of the public utility claiming to be injuriously affected, or on the commission's own motion, may, after hearing, make such order and prescribe such terms and conditions for the locating or type of the line, plant or system affected as to it may seem just and reasonable: provided, that power companies may, without such certificate, increase the capacity of their existing generating plants.

IDAHO CODE

Section 61-528

Certificate of convenience and necessity—Conditions. —Before any certificate of convenience and necessity may issue[,] a certified copy of its articles of incorporation, or charter, if the applicant be a corporation, shall be filed in the office of the commission. The commission shall have power, after hearing involving the financial ability and good faith of the applicant and necessity of additional service in the community to issue said certificate as prayed for, or to refuse to issue the same, or to issue it for the construction of any portion only of the contemplated street railroad, line, plant or system or extension thereof, or for the partial exercise only of said right or privilege, and may attach to the exercise of the rights granted by said certificate, such terms and conditions as in its judgment the public convenience and necessity may require.

APPENDIX H

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

Case. No. U-1500-157

IN THE MATTER OF THE PETITION OF THE UNITED STATES DEPARTMENT OF ENERGY IDAHO OPERATIONS OFFICE FOR A DECLARATORY RULING

PETITION FOR RECONSIDERATION
[BY UTAH POWER]

It is the position of UP&L that the record does not support, in any way, the Commission's finding in this regard, that the finding is contrary to both law and fact, and that the finding is arbitrary, capricious and *may* ultimately be confiscatory of the property of the Company.

. . . .

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. . . .

. . . It is submitted that the Commission's order is contrary to the evidence, legally arbitrary, capricious and will ultimately result in confiscation of the property of the Company, in violation of due process of law. . . .

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IN THE SUPREME COURT
OF THE STATE OF IDAHO

Supreme Court No. 16363

IN THE MATTER OF THE PETITION OF THE UNITED STATES DEPARTMENT OF ENERGY IDAHO OPERATIONS OFFICE FOR A DECLARATORY RULING

UTAH POWER & LIGHT CO.,
Appellant,

vs.

IDAHO PUBLIC UTILITIES COMMISSION,
UNITED STATES DEPARTMENT OF ENERGY, and
IDAHO POWER COMPANY,
Respondents.

Appeal from the Idaho Public Utilities Commission

APPELLANT'S [UTAH POWER] BRIEF

Because the Commission's order in this case effectively deprives UP&L of a certificated right to serve DOE, and because this court has previously held that a certificate of convenience and necessity is a property right protected by the provisions of both the United States and Idaho constitutions, . . . review of the Commission's order by this court requires a careful inquiry into these constitutional protections and requires a determination of whether the Commission's decision does deprive UP&L of its property without due process, pursuant to a mis-

application of law or without substantial and competent supporting evidence. . . .

. . . .

Pages 17-18

. . . .

The Commission's decision, which allows IPC the exclusive right to serve DOE upon termination of the three-party agreement, effectively deprives UP&L of its certificated right to serve, a property right under the United States and Idaho constitutions, without just compensation or due process of law. . . .

. . . .

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IN THE SUPREME COURT
OF THE STATE OF IDAHO

Supreme Court No. 16363

IN THE MATTER OF THE PETITION OF THE UNITED STATES DEPARTMENT OF ENERGY IDAHO OPERATIONS OFFICE FOR A DECLARATORY RULING

UTAH POWER & LIGHT CO.,
Appellant,

vs.

IDAHO PUBLIC UTILITIES COMMISSION,
UNITED STATES DEPARTMENT OF ENERGY, and
IDAHO POWER COMPANY,
Respondents.

[UTAH POWER] BRIEF ON REHEARING

Justice Bakes' dissenting opinion contains an excellent analysis of why the majority's opinion violates UP&L's procedural and due process rights under both the United States (15th and 16th Amendments)[*] and Idaho Constitution (Art 1, § 13). UP&L would add emphasis to those points made.

In terms of the procedural due process rights which were not afforded to UP&L in 1969, a thorough review

---

[* This reference to the "15th" and "16th" Amendments is inadvertent. They were not cited in Justice Bakes' dissent, which discussed only the federal and state procedural and substantive due process issues. Article 1, Section 13 of the Idaho Constitution provides that "no person shall . . . be deprived of life, liberty or property without due process of law." All of the discussion of constitutional issues in the Brief on Rehearing was related to procedural and substantive due process.]

of the record in this case conclusively demonstrates that it would have been impossible for UP&L to know, in 1969, that IPC was seeking a certificate which would grant the authority to ultimately and exclusively serve the electrical energy needs of DOE. It would have been equally impossible to discern that the IPUC was entering an order granting such authority. There is not a single phrase in IPC's application for Amended Certificate No. 268 . . . which intimates in the slightest way that IPC intended to use its participation in the AMPS line as a means of later acquiring the opportunity to exclusively serve DOE in Butte County. . . .

UP&L's failure to object to Amended Certificate No. 268 is clearly traced right back to IPC's application at that time, which could not possibly have put UP&L on notice and given the Company an opportunity to respond to the interpretation now given that application and certificate by the IPUC and the majority in this case. It is inconceivable that the majority of this court can sit back and so lightly dismiss the critical protection afforded by the notice requirements of the respective due process clauses. . . .

It is equally clear that UP&L's substantive due process rights have been abridged if the IPUC's and the majority's decision results in the taking of a constitutionally-protected property right. Such a taking occurs when a company in the position of UP&L is deprived of its property because the Commission, and this court, has rendered a decision that cannot be sustained by the record and is, therefore, arbitrary and capricious.

. . . There simply are no facts to sustain the Commission's decision; therefore, that decision, and the majority's affirmance of that decision, "takes" UP&L's property right in its Butte County Certificate without just compensation and contrary to applicable due process considerations.

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APPENDIX I

BEFORE THE
PUBLIC UTILITIES COMMISSION OF THE
STATE OF IDAHO

Case No. F-698

Order No. 1158

IN THE MATTER OF THE APPLICATION OF THE
UTAH POWER & LIGHT COMPANY FOR A
CERTIFICATE OF CONVENIENCE AND
NECESSITY IN BUTTE COUNTY, IDAHO

On March 20, 1929, the Utah Power & Light Company filed with the Public Utilities Commission of the State of Idaho, its duly verified application for a certificate of convenience and necessity, stating that the present and future public convenience and necessity require the applicant to furnish electricity for light, heat, power and other purposes to Wilbert Mining Company and mine, and to other customers throughout Butte County, Idaho, and to exercise any and all rights and privileges which may now or hereafter be granted the applicant by Butte County, Idaho by franchise for electric service in said county and by the incorporated cities and villages in Butte County for electric services therein.

Said matter came on regularly for hearing before the Commission at 9:00 o'clock A.M., March 21, 1929, at the office of the Commission in the State Capitol, Boise, Idaho. At said hearing James L. Boone appeared as a witness and submitted evidence on behalf of the applicant.

Upon said evidence and the verified petition, the Commission finds:

1. That the applicant, the Utah Power & Light Company, is a public service corporation organized under the

laws of the State of Maine, and authorized to do business in the State of Idaho by reason of its compliance with the laws thereof, with its principal place of business in Idaho at Idaho Falls, Bonneville County, and is engaged in operating a general electric system in certain districts in the State of Idaho.

2. That a duly certified copy of the articles of incorporation of the said Utah Power & Light Company has been filed, and now is on file, in the office of the Public Utilities Commission of the State of Idaho.

3. That on or about March 1, 1929, the Wilbert Mining Company, a corporation, requested this applicant to serve and deliver electrical power at the mines of said company in the northern part of Butte County, Idaho, and that said applicant agreed with said company to furnish power as aforesaid, providing necessary arrangements could be made; that thereupon the applicant obtained from the Village of Arco in said county of Butte a tentative lease of a part of the electric transmission line of said village, extending from Howe in said county eastward to the western terminus of applicant's present transmission line in Madison County, Idaho.

4. That the Utah Power & Light Company desires to construct a transmission line from Howe northward to said Wilbert mine, for the purpose of serving said mine and other customers who may require electricity for light, heat, power and other purposes, and to maintain and operate said lines and to render service as aforesaid on and over the same.

5. That no person, corporation or association of persons is engaged in the business of transmitting or serving electricity for light, heat, power or other purposes in said County of Butte, Idaho, excepting the Village of Arco, Butte County, Idaho, and the Little Lost River Power Company, and the said Village of Arco and the Little Lost River Power Company, a corporation, have each filed its waiver of the notice of time and place of hearing and its

consent to the issuance of a certificate of convenience and necessity to the applicant for Butte County, Idaho, and the present and future convenience and necessity require the applicant, the Utah Power & Light Company, to render service for light, heat, power and other purposes to the Wilbert Mining Company and to other customers in Butte County, excepting those customers served by the Village of Arco, a municipal corporation, and the Little Lost River Power Company, a corporation.

6. That the present and future convenience and necessity of the public require, and will require, that the applicant, the Utah Power & Light Company, furnish to the Wilbert Mining Company in Butte County, Idaho, and to other customers in Butte County, excepting those customers served by the Village of Arco, a municipal corporation, and the Little Lost River Power Company, a corporation, electric energy for light, heat, power and other purposes, and in connection therewith to erect, extend, maintain and operate a system sufficient for such purposes; and that said applicant be authorized to exercise such powers, rights and privileges as have been granted, and may hereafter be granted, to it by franchise or franchises from Butte County, and from any city or village within the said county, subject, however, to the rules, orders and control of the Commission as to service and facilities.

IT IS THEREFORE ORDERED, That a certificate of convenience and necessity covering the said County of Butte, Idaho, as above provided, be issued to the applicant herein, in conformity to the findings hereof.

DONE IN OPEN SESSION at Boise, Idaho, this 21st day of March, 1929.

/s/ Frank E. Smith

/s/ J.M. Thompson

/s/ Will H. Gibson
Commissioners.

BEFORE THE
PUBLIC UTILITIES COMMISSION OF THE
STATE OF IDAHO

Case No. F-698

Certificate No. 117

IN THE MATTER OF THE APPLICATION OF THE
UTAH POWER & LIGHT COMPANY FOR A
CERTIFICATE OF CONVENIENCE AND
NECESSITY IN BUTTE COUNTY, IDAHO

It is hereby certified that the public convenience and necessity require, and will require, the Utah Power & Light Company, a corporation, its successors and assigns, to construct, maintain and operate a general electrical system for the supplying of electricity for light, heat, power and other purposes to the Wilbert Mining Company in Butte County, Idaho, and to all residents adjacent to its transmission lines in Butte County, Idaho, and to exercise the rights and privileges that have been, or may hereafter be, issued to the Utah Power & Light Company, its successors and assigns, by the County of Butte, Idaho, and by any city or village within the County of Butte, Idaho.

This certificate is predicated upon and issued pursuant to the findings and order of this Commission in the above entitled matter made and entered on the 21st day of March, 1929, to which reference is hereby made.

DONE IN OPEN SESSION at Boise, Idaho, this 21st day of March, 1929.

/s/ Frank E. Smith

/s/ J.M. Thompson

/s/ Will H. Gibson
Commissioners

APPENDIX J

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF IDAHO

Case No. U-1006-67

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY (FOR TRANSMISSION LINE ONLY) IN POWER BINGHAM AND BUTTE COUNTIES, IN THE STATE OF IDAHO

APPLICATION FOR CERTIFICATE OF
CONVENIENCE AND NECESSITY

The application of Idaho Power Company respectfully shows:

I

That Idaho Power Company is an electrical public utility corporation organized and existing under and by virtue of the laws of the state of Maine, and duly qualified to do business in the state of Idaho by virtue of a compliance with the laws of said state; that applicant owns extensive hydroelectric generating plants, together with transmission and distribution systems in the state of Idaho; that the principal place of business and post office address of applicant in the state of Idaho is 1220 Idaho Street, P.O. Box 70, Boise, Ada County, Idaho; that applicant maintains local and division offices in various parts of the state of Idaho and has property in said state

having an assessed value of more than $83,869,327, and applicant alleges that it is possessed of the financial resources required for the purpose of this application. That a certified copy of said Articles of Incorporation is on file with this Commission as a part of the record and files in File No. U-1006-52, which said certified copy is by reference made a part of this application. Reference is also made to the records and files of the Secretary of State of Idaho for official certified copy of the Articles of Incorporation of Idaho Power Company, together with amendments thereto.

II

Applicant alleges that it has previously entered into a five-company interconnection agreement with The Washington Water Power Company, The Montana Power Company, Utah Power & Light Company and Pacific Power & Light Company, a copy of which agreement has been filed with and approved by the Commission in Case No. U-1008-46, Order No. 7960. Applicant further alleges that in order to facilitate such interconnection, to provide operating economies and enhance the reliability of the respective systems, the interconnection agreement provided for the construction by the respective companies of 230 kv transmission lines, together with the necessary facilities, extending from Noxon, Montana to Anaconda, Montana and thence to the Brady substation at American Falls, Idaho, and from the Naughton substation at Kemmerer, Wyoming to Treasureton, Idaho, with each company to construct described portions of said lines.

III

Pursuant to said interconnection agreement, the 230 kv transmission line and facilities in the state of Idaho will be constructed by Utah Power & Light Company from a point on the Montana-Idaho state line to a point in the vicinity of Utah Company's Scoville substation and by Idaho Power Company from the vicinity of Utah Com-

pany's Scoville substation to Idaho Power Company's Brady substation near American Falls, Idaho, all as shown on Exhibit "A" attached hereto and by reference made a part hereof.

IV

Applicant alleges that the portion of the line to be constructed by Idaho Power Company will commence in the Southwest Quarter of the Northeast Quarter of Section 15, Township 3 North, Range 29 East, Boise Meridian, Butte County, Idaho, and will extend a distance of approximately 60 miles in a generally southerly direction through Butte, Bingham and Power Counties to the Northwest Quarter of the Northwest Quarter of Section 22, Township 4 South, Range 30 East, Boise Meridian, Power County Idaho, as shown on map marked Exhibit "B" and by reference made a part hereof

V

Applicant states that it has previously obtained and now has certificates of convenience and necessity for general electric service in Power and Bingham Counties, but it does not have any certificate of convenience and necessity for Butte County, Idaho.

VI

That said transmission line will be constructed and operate at a nominal voltage of 269,000 volts, and the same will not be available for, or dedicated to, the furnishing of general service along its route, and the construction of this transmission line will not compete with any other public utility, corporation or person.

VII

That said transmission line will consist in general of two pole, cedar, flat construction. However, in agricultural areas the construction may consist of laminated

poles in order to allow longer spans and increased line height. Construction of the line will commence immediately following obtainment of all necessary permits and rights of way. A copy of the Company's financial statement has heretofore been filed in File No. U-1006-66, reference to which is hereby made.

VIII

That the public convenience and necessity will be served by, and require, and will continue to require, the construction and operation of the aforedescribed transmission lines, including the portion thereof to be owned and operated by Idaho Power Company for the following reasons:

1. That said lines will make an additional interconnection between the electric systems of The Washington Water Power Company, The Montana Power Company, Idaho Power Company, Utah Power & Light Company and Pacific Power & Light Company which interconnecting facilities in conjunction with those already existing between the systems will enable the various systems to coordinate and will make possible transmission and interchange of electrical power and energy as the public use may require.

2. The construction and operation of the lines will permit the realization of the many advantages that result from interchanges between systems and will make possible utilization by each company of generating capacity in the other systems, thereby facilitating the planning and timing of construction of new and additional generating units.

3. That said lines, and the interconnection made possible, will provide a means for integration, coordination and further economic development and utilization of the power resources.

IX

WHEREFORE, Idaho Power Company requests that the Idaho Public Utilities Commission grant the company a certificate that the public convenience and necessity requires that said Idaho Power Company, its successors and assigns, construct, own and operate that portion of the transmission line in and through Power, Bingham and Butte Counties, in the state of Idaho, and particularly that portion in Butte County wherein the Company does not have a certificate of convenience and necessity as described heretofore and exercise the rights and privileges granted, or which may be granted by franchise to be obtained from said Butte County and by existing franchises in Power and Bingham Counties; and that said certificate of convenience and necessity be limited to the transmission, interchange and supply of high voltage electric power and energy as herein set forth.

Dated at Boise, Idaho this 8th day of January, 1969.

IDAHO POWER COMPANY

By /s/ Albert Carlson
President

STATE OF IDAHO)
) ss
COUNTY OF ADA)

Albert Carlson, being first duly sworn, upon his oath, deposes and says:

That he is the President of Idaho Power Company; that he has read the above fore going application, knows the contents thereof, and believes the same to be true.

/s/ Albert Carlson

SUBSCRIBED AND SWORN TO, before me this 8th day of January, 1969.

/s/ James E. Bruce
Notary Public for the
State of Idaho
Residing at Boise, Idaho
Commission expires:

(NOTARY SEAL)

Supreme Court, U.S.
FILED
MAY 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1656

In The

Supreme Court of the United States

October Term, 1986

—o—

UTAH POWER & LIGHT COMPANY,

Appellant,

v.

IDAHO PUBLIC UTILITIES COMMISSION, UNITED STATES DEPARTMENT OF ENERGY, and IDAHO POWER COMPANY,

Appellees.

—o—

On Appeal from the Supreme Court of Idaho

—o—

MOTION TO DISMISS OF APPELLEE IDAHO PUBLIC UTILITIES COMMISSION

—o—

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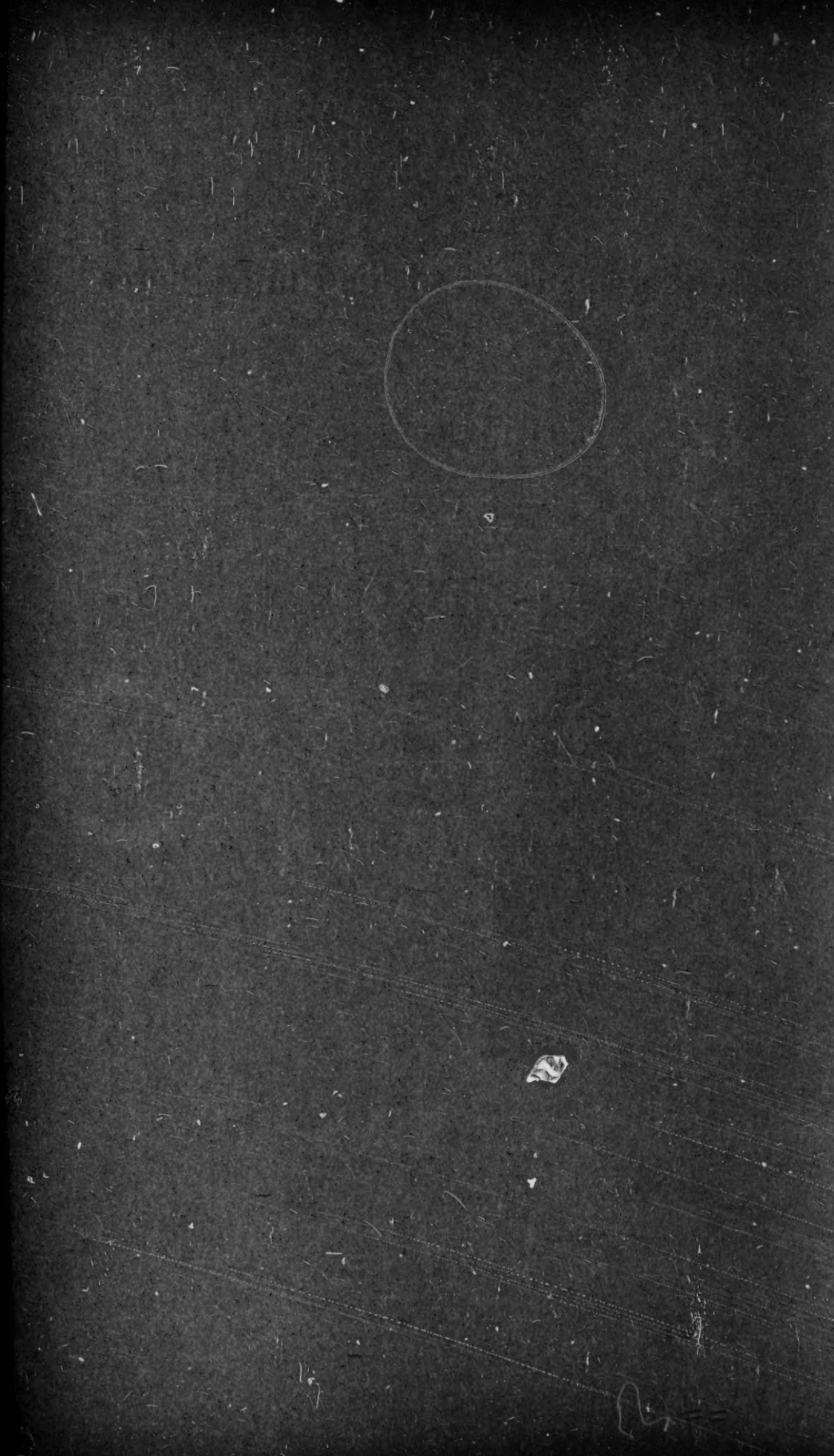

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MOTION TO DISMISS

Appellee Idaho Public Utilities Commission hereby moves to dismiss the appeal of Utah Power & Light Company in No. 86-1656. Appellant challenges orders of the Idaho Public Utilities Commission affirmed on appeal by the Supreme Court of Idaho in *Utah Power & Light Company v. Idaho Public Utilities Commission*, — Idaho —, 730 P.2d 930 (1986). The Commission's orders in that case "decided that, as between two utilities with valid certificates to deliver energy at transmission voltage, the utility that is currently and satisfactorily serving the disputed area may continue to do so." — Idaho at —, 730 P.2d at 935. Appellant contends the orders were state "statutes" that deprived it of its property without just compensation and without notice and due process, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Appellee contends the Court has no jurisdiction to hear the appeal because the orders of the state commission were not state "statutes" under the Court's jurisdictional statutes.

The Jurisdictional Statute. 28 U.S.C. § 1257(2) provides for direct appeal where the question of "the validity of a statute of any state" is challenged under the Constitution of the United States, and the highest state court reviewing the statute upholds it. The appellant's brief at pages 2-3 states the following reasons for the Court's jurisdiction in No. 86-1656:

> The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). State public utilities commission orders issued under delegated authority are "state statutes" for purposes of 28 U.S.C. § 1257(2). *E.g.*,

Atchison, Topeka & Santa Fe Railroad Co. v. Public Utility Commission, 346 U.S. [346] (1953); *Lake Erie & Western Railroad Co. v. Public Utilities Commission*, 249 U.S. 422, 424 (1919); *William v. Bruffy*, 96 U.S. 176, 183 (1878) (under predecessor statute).

Accordingly, the Court's jurisdiction on direct appeal can be invoked in No. 86-1656 only if the orders of the Idaho Public Utility Commission reviewed by the state court are "statutes" within the meaning of 28 U.S.C. § 1257(2). But, appellee contends that those orders are not "statutes" under 28 U.S.C. § 1257(2), and the appeal should be dismissed.

Some Regulatory Commission Orders Are "Judgments", Not "Statutes", For Jurisdictional Purposes. The Court's precedents hold that *some* orders of state public utilities commissions are "statutes" within the meaning of 28 U.S.C. § 1257(2), but the Court's precedents also establish the analytical framework showing that not all such orders are "statutes" for purposes of determining the Court's appellate jurisdiction. The Court's own analyses show that orders of the kind issued in this case by the appellee Idaho Public Utilities Commission and affirmed on appeal by the Supreme Court of Idaho are not state "statutes" within the meaning of this Court's jurisdictional statutes.

There is a distinction between regulatory commission orders in the nature of "judgments" (judicial in nature) and those in the nature of "statutes" (legislative in nature). *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), sets forth the test by which orders of a public utilities commission are classified for analysis under the Court's jurisdictional statutes. In *Prentis* the Court as-

sumed that for some purposes a state regulatory commission was a court, but explained why for others it was a legislative body:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed to already exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind.

211 U.S. at 226. The nature of a proceeding "depends not upon the character of the body but upon the character of the proceeding." *Ibid.*

The judicial-legislative dichotomy of *Prentis* is still applied in the Court's analysis of its own jurisdiction to review lower court decisions. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476-477 (1983). Proceedings before a state tribunal that are adversary in nature and in which a declaration of rights under existing law is sought and given are judicial, not legislative. *Id.* at 478-480.

In this proceeding the appellee United States Department of Energy sought a declaration that the appellee Idaho Power Company had a right to serve it exclusively. The appellant Utah Power contended that its previously existing certificate gave Utah Power the exclusive right to serve. The appellee Idaho Power contended that its previously existing certificate gave it the right to serve. The appellee Commission's findings agreed with the latter utility's position.

Conceding for the sake of argument that the orders of the Idaho Public Utilities Commission issuing the previously existing certificates were "legislative" acts that would be state "statutes" within the meaning of 28 U.S.C. § 1257(2); nevertheless, the Commission's declaratory orders determining whether the appellee United States Department of Energy had a right to take its electric service solely from the appellee Idaho Power Company and not from the appellant Utah Power & Light Company according to the terms of previously issued certificates of the two utilities was a judicial inquiry, not a state "statute" within the meaning of 28 U.S.C. § 1257(2). The *Prentis* rule, reaffirmed in *Feldman*, shows that this declaration of rights under previously existing certificates was in the nature of a "judgment" in a case or controversy, not in the nature of a "statute", and the Court has no jurisdiction under 28 U.S.C. § 1257(2) to hear a direct appeal from the Supreme Court of Idaho's affirmance of the declaratory orders of the Idaho Public Utilities Commission because those orders were not "statutes".

Appellant's Cases Do Not Support Jurisdiction Over This Appeal. The cases cited by the appellant for the proposition that some orders of state public utilities commissions are state "statutes" under 28 U.S.C. § 1257(2) are inapposite.

In *Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission*, 346 U.S. 346 (1953), the Court reviewed several orders of the California Public Utilities Commission. Pursuant to the Public Utilities Code of California, the California Commission issued orders directing the upgrade or improvement of certain grades, crossings, separations, etc.; the Orders further allocated the

costs among railroads and other entities. For jurisdictional purposes, the Court considered these orders like statutes enacted by the legislature directing that future improvements be made and apportioning these costs in the interest of public safety, convenience and necessity. 346 U.S. at 348.

Each order of the California Commission was a directive to undertake certain future conduct (improvements near railroad property and payment of costs), not an adjudication of liabilities, rights or responsibilities under past law, because no person had a "right" to any particular kind of improvement or a "liability" for any particular cost under previously existing law. Instead, the orders themselves made legislative-like decisions to order the improvements thought necessary and to prescribe the terms for apportioning costs. *Ibid.*, n.2. Those orders were therefore state "statutes". The precedent is inapposite to the orders under review in this case, which adjudicated rights under previously existing certificates.

In *Lake Erie & Western Railroad Co. v. Public Utilities Commission*, 249 U.S. 422 (1919), the Illinois Public Utilities Commission ordered Lake Erie & Western Railroad Company to restore track that had been removed from an area where a grain elevator and coal yard had been destroyed by fire. Again, the order was a directive for future action, not an adjudication of rights under former law. It is properly considered legislative in nature under *Prentis* and is not precedent applying to the facts in this case.

Finally, in *Williams v. Bruffy*, 96 U.S. 176 (1878), the Court did not consider an order of a public utilities commission, but the status to be accorded an enactment of the

Confederate States of America during the Civil War *vis-a-vis* Virginia statutes, i.e., whether the Commonwealth of Virginia had itself assented to the Confederate enactment in a manner for it to be considered a state "statute" under the predecessor to 28 U.S.C. § 1257(2). The "statute" in question sequestered the property and contract rights of citizens of the United States and was thus a rule for future conduct. Therefore, it was also legislative under the *Prentis* test.

The cases cited by the appellant in favor of jurisdiction under 28 U.S.C. § 1257(2) involved delegation of legislative authority that "look[ed] to the future and change[d] existing conditions by making of a new rule to be applied thereafter . . . ." Such new rules are properly considered "statutes" under 28 U.S.C. § 1257(2).

By contrast, the orders of the Idaho Public Utilities Commission in this proceeding were in the nature of a judicial inquiry because they "investigate[d], declare[d] and enforce[d] liabilities as they st[ood] on present or past facts and under laws supposed to already exist." Appellee reviewed two utilities' existing certificates and declared rights under them. It did not create new certificates. Accordingly, the orders of the Idaho Public Utilities Commission that appellant seeks to review are not state "statutes" within the meaning of 28 U.S.C. § 1257(2), and the Court has no jurisdiction to hear a direct appeal from the Supreme Court of Idaho's judgment affirming those orders.

Therefore, the appellee Idaho Public Utilities Commission moves the Court to dismiss No. 86-1656 for lack of jurisdiction under 28 U.S.C. § 1257(2).

———o———

OPPOSITION TO GRANT OF CERTIORARI

Treating the appellant's notice of appeal as a petition for a writ of certiorari, 28 U.S.C. § 2103, in which case the Court has jurisdiction to review the judgment of the Supreme Court of Idaho under 28 U.S.C. § 1257(3), regardless of the classification of the orders as judicial or legislative in nature, the writ of certiorari should not be issued because:

(1) There are no conflicting state or federal court decisions on the narrow question of interpretation of the certificates of public convenience and necessity of Utah Power & Light Company and Idaho Power Company for Butte County, Idaho; and

(2) There is no national interest in resolution of this narrow question of the law of these two utilities' certificates for Butte County, Idaho.

DATED this 8th day of May, 1987.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UTAH POWER & LIGHT COMPANY,
Appellant

v.

IDAHO PUBLIC UTILITIES COMMISSION,
UNITED STATES DEPARTMENT OF ENERGY, AND
IDAHO POWER COMPANY,
Appellees

On Appeal from the Supreme Court of Idaho

MOTION TO DISMISS OF APPELLEE IDAHO POWER COMPANY

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Sup. Ct. R. 16 . . . . . 1, 5

MOTION TO DISMISS

COMES NOW, IDAHO POWER COMPANY, Appellee, ("Idaho Power") and pursuant to Sup. Ct. R. 16 moves this court to dismiss the appeal of Utah Power & Light Company, ("Utah Power") of the final judgment of the Supreme Court of Idaho, entered on November 26, 1986, as 1986 Opinion No. 154 in the case *Utah Power & Light Company v. Idaho Public Utilities Commission,* ____Idaho____, 730 P.2d 930 (1986), for the following reasons and upon the following grounds:

I

NO FEDERAL QUESTIONS PRESENTED

The Idaho Supreme Court succinctly described the resolution of the dispute before the Idaho Public Utilities Commission by stating, "as between two utilities with valid certificates to deliver energy at transmission voltage, the utility that is currently and satisfactorily serving the disputed area may continue to do so." *Utah Power,* 730 P.2d at 935. Appellant Utah Power claims that the Idaho Public Utilities Commission order violates Utah Power's rights under the Fifth and Fourteenth Amendments to the United States Consitution. Utah Power alleges that by this order its property has been taken without just compensation. The alleged property right of which Utah Power claims to be deprived is its Certificate of Convenience and Necessity or franchised right to provide service in Butte County, Idaho. However, a fair reading of the decisions shows that nothing in the order of the Idaho Public Utilities Commission or in the decision of the Idaho Supreme Court visits a constitutional violation on Utah Power.

Appellee Idaho Public Utilities Commission in its Order No. 20136 dated November 27, 1985, *Appellant's Appendix D,* determined that both Appellant Utah Power and Appellee Idaho Power had valid Certificates of Public Convenience and Necessity for all five counties in which Appellee United States Department of Energy ("D.O.E.") operates. The Idaho Public Utilities Commission, after a meticulous inquiry into the evidence presented, determined that Appellee Idaho Power had the legal authority to serve D.O.E. at transmission voltage in Butte County, Idaho. *Id.* As the Idaho Public Utilities Commission ruled:

> [W]e base our decision on IPCo's (Idaho Power's) Certificate No. 268 and the fact that Idaho Power is currently *serving* the entire D.O.E. load. (emphasis original)
>
> The conflict in this case arises from the fact that Utah (Power) also has the legal authority to serve customers in Butte County at transmission levels. The question is therefore presented: **When two utilities, both of whom have the legal right to serve a particular area, are vying to serve that area, which utility or utilities should be given the authority to do so? Under the facts of this case we find that the utility that is currently and satisfactorily serving the disputed area may continue to do so.** (emphasis added) We further find that, the three-party agreement not withstanding, Idaho Power is the utility that is currently serving D.O.E. The record is replete with evidence that Idaho Power shoulders the full responsibility of providing D.O.E. with its day in and day out energy and power requirements. We also find that Idaho Power is properly performing this service under a certificate that allows it to

> "transmi[t], interchange and *supply*" high voltage electric power and energy. We find that permission to "supply" high voltage power and energy encompassed the right to deliver and provided that power and energy to D.O.E., the only such actual or potential high voltage customer contemplated by the certificate. (emphasis original)
>
> Another factor weighing in favor of our decision is the public interest considerations of the effect of our decision on the rates the citizens of Idaho must pay. To decide in favor of Utah would place an unnecessary and burdensome rate increase on not only (Idaho Power's) Idaho customers, but also on Utah Power and Light Company's Idaho customers.

See Appellant's Appendix A, pp. 49a, 50a.

The Idaho Public Utilities Commission's decision did not strip Appellant Utah Power of a certificated franchise service territory or in any way limit or qualify Utah Power's Butte County franchise. Rather, the Idaho Public Utilities Commission simply allowed D.O.E. to terminate a supply contract involving two properly certificated supplying utilities (Utah Power and Idaho Power) and choose between them as to which should be the sole supplier. D.O.E. chose Appellee Idaho Power, the utility which historically had been providing actual service. No "taking" of a property right was involved. As the Idaho Supreme Court observed:

> Two factual findings of the Idaho Public Utilities Commission are before us: First, the Idaho Public Utilities Commission finding that Idaho Power Company has a valid Certificate of Public Convenience

and Necessity to serve D.O.E. and; second, the Idaho Public Utilities Commission finding that the Idaho Power Company is currently supplying D.O.E.'s entire load, which finding supports the conclusion that the Idaho Power Company should be entitled to solely supply D.O.E. upon termination of the three-party agreement.

There is ample evidence in the record to sustain both findings of the Public Utilities Commission. The Commission correctly recognized that, while Idaho Power Company's amended certificate No. 268 gave it no general grant of authority to serve all customers in Butte County, the certificate nevertheless allowed Idaho Power to *supply* the power and energy at *transmission* level for the benefit of one customer — D.O.E. ... (emphasis original)

Rather, the Commission correctly decided that, as between two utilities with valid certificates to deliver energy at transmission voltage, the utility that is currently and satisfactorily serving the disputed area may continue to do so. Such a conclusion is mandated by the unique factual situation presented by this case — that of a heavy consumer dependent upon a continuous, reliable, large-scale supply of electricity.

We reiterate that this holding is in no way meant to implicitly approve the "pirating away" of customers encompassed within the geographical area contained in another utility's franchise area supported by a valid certificate of convenience and necessity. Instead, we are responding to the peculiarities of the situation before us, that is, where two utilities once shared the authority to service a customer and it is

> now necessary to determine which of the two shall continue the service.

Utah Power, 730 P.2d at 934.

The above-quoted language of the Idaho Supreme Court opinion underscores the Idaho Supreme Court's extensive attention to and careful review of the factual record before the Idaho Public Utilities Commission. The Idaho Supreme Court determined that the evidence competently and substantially supported the Idaho Public Utilities Commission's decision that where, as here, two utilities have valid certificates to deliver energy at transmission voltage to D.O.E., the utility which is currently and satisfactorily serving D.O.E. may continue to do so. Here that utility is Idaho Power. This holding does not disturb Appellant Utah Power's certificate for Butte County and does not constitute a taking of property without compensation.

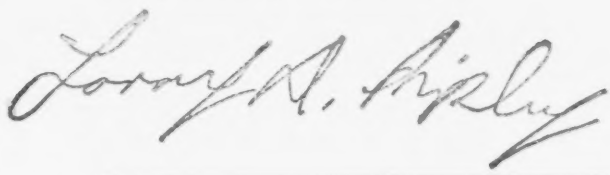
As provided by Sup. Ct. R. 16, a motion to dismiss an appeal from a state supreme court to the U.S. Supreme Court may be made on the grounds that the appeal "does not present a substantial federal question; ...or that the judgment rests on an adequate non-federal basis." *Id.* The decision of the Idaho Supreme Court, as outlined above, clearly rests on facts competent, substantial, and **independent** of Fifth and Fourteenth Amendment due process guarantees. There simply was not a "taking" of Utah Power's property; Utah Power still has a valid Certificate of Public Convenience and Necessity to serve in Butte County.

WHEREFORE, Appellee Idaho Power moves the Court to dismiss appeal No. 86-1656 for lack of jurisdiction, on the grounds that it does not present a federal question and

that the Idaho State Supreme Court decision rests on an adequate non-federal basis.

DATED this 14th day of May, 1987.

Respectfully submitted,



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No. 86-1656

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1987

UTAH POWER & LIGHT COMPANY, APPELLANT

v.

IDAHO PUBLIC UTILITIES COMMISSION, ET AL.

ON APPEAL FROM THE SUPREME COURT OF IDAHO

MOTION TO DISMISS

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QUESTION PRESENTED

Whether appellant, an electric utility company that has a certificate of public convenience and necessity authorizing the delivery of energy in a geographic area that includes a United States Department of Energy (DOE) facility, was deprived of its rights under the Fifth and Fourteenth Amendments by the Idaho Public Utilities Commission's determination that a second utility company is also authorized to supply energy to the DOE facility and that the second utility—which is now satisfactorily serving the DOE facility—has the right to continue to provide that service.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1656

UTAH POWER & LIGHT COMPANY, APPELLANT

v.

IDAHO PUBLIC UTILITIES COMMISSION, ET AL.

ON APPEAL FROM THE SUPREME COURT OF IDAHO

MOTION TO DISMISS

The Solicitor General, on behalf of the United States Department of Energy, moves pursuant to Rule 16.1 of the Rules of this Court that this appeal be dismissed for want of jurisdiction.

OPINIONS BELOW

The opinion of the Supreme Court of Idaho (J.S. App. 1a-25a) is reported at 112 Idaho 10 and 730 P.2d 930. The opinion of the Idaho Public Utilities Commission (J.S. App. 30a-56a) is unreported.

JURISDICTION

The judgment of the Idaho Supreme Court was entered on November 26, 1986. A petition for re-

hearing was denied on January 16, 1987 (J.S. App. 26a-27a). The notice of appeal (J.S. App. 61a-64a) was filed on April 13, 1987, and the appeal was docketed on April 15, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

STATEMENT

1. Since 1949, the Department of Energy (DOE)[1] has owned and operated, directly or through contractors, the Idaho National Engineering Laboratory (INEL). The INEL is a 900-square-mile nuclear research facility located in five counties in southeastern Idaho.[2] Electric service in that area of Idaho was first provided by appellant, a utility company authorized to provide such service under Idaho law. During the 1940s, appellant was the exclusive supplier of electricity to the Naval Proving Grounds, the federal facility that preceded the INEL. Appellant also provided electric power to the INEL during the first year of the laboratory's existence. J.S. App. 2a, 35a-36a.

In 1950, DOE, appellant, and appellee Idaho Power Company (IPC), with the approval of the Idaho Public Utilities Commission (IPUC), entered into a three-party agreement for the provision of electric service to the INEL. Under that agreement, which designated DOE as " 'buyer,' " IPC as " 'seller,' " and appellant as " 'a party of the second part' " (J.S. App. 2a), IPC agreed to " 'supply or stand ready to

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[1] References to the Department of Energy include its predecessor agencies, the Atomic Energy Commission and the Energy Research and Development Administration.

[2] The state supreme court erroneously stated that the facility occupied 980 square miles.

supply[] the full amount of [DOE's] power requirements,' " up to 20,000 kilowatts, and appellant agreed "to construct and maintain a 132 KV transmission line" to deliver the electricity (*id.* at 35a). In a separate two-party agreement, IPC and appellant established a " 'pool account' " into which DOE's payments for their respective services were deposited by IPC and from which the utilities withdrew periodic disbursements. J.S. App. 3a, 35a.

In 1957, the three-party-agreement was amended to provide for DOE's increased power requirements. The amended agreement stated that " '[s]eller (Idaho Power), in cooperation with [appellant] shall sell and deliver to buyer * * * all electric power required by buyer * * * up to 40,000 kw' " (J.S. App. 35a-36a). The two-party agreement between IPC and appellant was amended at the same time to reflect the increased power requirements (*id.* at 3a, 36a).[3]

During the first 19 years that the three-party agreements were in effect, both IPC and appellant had certificates of public convenience and necessity authorizing the provision of electric service in four of the five counties in which the INEL is located. Only appellant had a certificate of public convenience and necessity to supply electric service to customers in Butte County. In 1969, IPC obtained a certificate of public convenience and necessity for Butte County from the Idaho Public Utilities Commission. The cer-

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[3] Appellant has provided less than two percent of the electricity supplied to the INEL under these agreements; it has, however, supplied "standby capacity" (J.S. App. 3a). Since 1978, all of the electricity supplied to the INEL has been generated by IPC (*ibid.*).

tificate stated that it was " 'limited to the transmission, interchange and supply of high voltage electric power and energy.' " J.S. App. 3a; see also *id.* at 53a-56a.

2. On January 30, 1985, the Department of Energy petitioned the Idaho Public Utilities Commission for a declaratory ruling that IPC would have the right to be sole supplier of electricity to the INEL upon termination of the three-party agreement. Following "extensive discovery," "direct and rebuttal testimon[y]," and a public hearing, the Commission granted the DOE petition (J.S. App. 30a-52a).

The Commission rejected appellant's contention that IPC had no authority to serve customers in Butte County because the 1969 certificate of public convenience and necessity simply granted IPC the authority to construct and maintain a transmission line across the county. The Commission stated that "[w]hile Idaho Power's certificate gave it no general grant of authority to serve all customers in Butte County, it nevertheless allowed it to *supply* power and energy at the transmission level, and there was one customer for whose benefit this was obviously done: DOE" (J.S. App. 46a (emphasis in original)). The Commission found that IPC in 1969 obtained "a valid Certificate of Public Convenience and Necessity to serve customers in Butte County at transmission levels" and that IPC "is currently *serving* the entire DOE load" (*id.* at 49a (emphasis in original)). "When two utilities, both of whom have the legal right to serve a particular area, are vying to serve that area," the Commission stated, "the utility that is currently and satisfactorily serving the disputed area may continue to do so" (*ibid.*). The Commission

concluded that IPC had the right to continue to serve the DOE facility.[4]

3. The Idaho Supreme Court upheld the Commission's determination by a divided vote (J.S. App. 1a-25a). The majority rejected appellant's argument that a state statute designed to prevent " 'pirating' away of customers of competing utilities" precluded IPC from serving the DOE facility without first obtaining appellant's consent (*id.* at 7a). That argument was unavailing "in this unique factual situation," the court held, because the present case involves "delivery to a special contract customer (DOE) in a situation where both utilities had authority to deliver energy * * * and [,] more importantly, where there is a history * * * show[ing] that Idaho Power was, and has been for a long number of years, the primary supplier of the energy to DOE" (*id.* at 7a-8a).

The court also held that the Commission's decision that IPC is entitled to serve DOE upon the termination of the three-party agreement is "supported by substantial and competent evidence and [that] there has been demonstrated no clear abuse of discretion" (J.S. App. 10a). "There is ample evidence in the record," the court concluded, to sustain the Commission's finding that IPC's certificate of convenience and necessity permits it "to *supply* the power and energy at *transmission* level for the benefit of one customer—DOE" (*id.* at 9a (emphasis in original)).

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[4] The Commission also found (J.S. App. 50a) that the public interest weighed in favor of allowing IPC to be the sole supplier of power to the INEL. It did not rest its decision on that finding, however, because it concluded that IPC's "right to serve DOE" is clear "regardless of public interest considerations" (*id.* at 48a).

And "the commission correctly decided that, as between two utilities with valid certificates to deliver energy at transmission voltage, the utility that is currently and satisfactorily serving the disputed area may continue to do so" (*ibid.*).[5]

Justice Bakes dissented (J.S. App. 11a-25a). Like the majority, he viewed the facts in this case as "somewhat unique" (*id.* at 13a). He concluded, however, that the Commission's factual findings "are not supported by substantial competent evidence" (*id.* at 25a). In Justice Bakes' view, IPC's certificate of public convenience and necessity did not authorize IPC to provide power to the DOE facility (*id.* at 20a-25a).

Justice Bakes further concluded that the majority's interpretation of IPC's certificate indicated that appellant had been deprived of its right to procedural due process when that certificate was granted in 1969. He stated that appellant was entitled to notice that IPC intended to serve " 'customers in Butte County' " before appellant's right to serve those customers was limited by the grant of a certificate to IPC, and that appellant had not been provided with such notice. J.S. App. 19a. Finally, he found that "due to the lack of support in the record" the Commission's substantive decision was "arbitrary and erroneous as a matter of law, and a *per se* * * * violation of substantive due process. * * * The IPUC's order clearly has deprived [appellant] of its property without due process of law and should be reversed" (*id.* at 20a).

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[5] The court also rejected appellant's argument that the IPUC lacked jurisdiction to issue a declaratory ruling, reasoning that the dispute in this case essentially involves contractual rights that may appropriately be determined " 'before or after there has been a breach' " (J.S. App. 4a).

ARGUMENT

1. a. Appellant seeks to invoke this Court's appellate jurisdiction under 28 U.S.C. 1257(2), which provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court * * * [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." Appellant states that "State public utilities commission orders issued under delegated authority are 'state statutes' for purposes of 28 U.S.C. § 1257(2)" (J.S. 2-3).

Appellant is simply wrong in its view that this Court's mandatory jurisdiction may be invoked in every case in which an order of a public utilities commission is challenged on federal constitutional grounds and the state supreme court sustains the order. It is "the legislative character of challenged state action, rather than the nature of the agency of the State performing the act, [that] is decisive of the question of jurisdiction" (*Lathrop* v. *Donohue*, 367 U.S. 820, 824 (1961) (plurality opinion)). Only orders of state regulatory commissions that are "made in the exercise of delegated *legislative* authority" are "statute[s] of the State in the sense of the jurisdictional provision" (*King Manufacturing Co.* v. *City Council*, 277 U.S. 100, 112 (1928) (emphasis added)).[6] Accordingly, an appeal to this Court will

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[6] All of the decisions cited by appellant in support of its jurisdictional claim involve legislative rules issued by state regulatory commissions. See *Atchison, T. & S.F. Ry.* v. *Public Utilities Comm'n*, 346 U.S. 346 (1953); *Lake Erie & W.*

lie only if an order of a public utilities commission sustained by a state court has "the characteristics of legislation." *Lathrop* v. *Donohue*, 367 U.S. at 827 (plurality opinion); see also R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 110 (6th ed. 1986).

The order of the Idaho Public Utilities Commission affirmed by the Idaho Supreme Court is plainly adjudicatory, not legislative. The Commission did not seek to regulate by promulgating rules to govern the conduct of those subject to its power; instead the Commission's order "disposed of * * * litigation between parties." *Lathrop* v. *Donohue*, 367 U.S. at 827 (plurality opinion); see also *King Manufacturing Co.* v. *City Council*, 277 U.S. at 104; *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908). The Commission's jurisdiction was invoked by a petition for a declaratory ruling and, following an adversary proceeding, the Commission issued an order providing that "upon the termination of the three-party contract * * * [IPC] shall have the right to continue to serve [DOE]" (J.S. App. 51a).

Both the majority and dissenting opinions in the state supreme court noted that "[t]his is not the ordinary public utilities case," but instead resembles a "contract dispute." J.S. App. 14a; see also *id.* at 4a. Indeed, the "central issue" (*id.* at 8a) before the state supreme court—whether the findings upon which the Commission's judgment is based are "supported by substantial evidence" (*ibid.*) or whether they are "clearly erroneous" (*id.* at 17a)—under-

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R.R. v. *Public Utilities Comm'n*, 249 U.S. 422 (1919); *Williams* v. *Bruffy*, 96 U.S. 176 (1877).

scores the quintessentially adjudicatory nature of this dispute. Cf. *Lerner* v. *Casey*, 357 U.S. 468, 473 (1958) (an appeal does not lie where "the constitutional questions before us relate primarily, and more substantially, to the propriety of the findings made by [a state agency] rather than to the validity of the provisions of the [law under which it acted]").

b. Moreover, even if an appeal would otherwise lie in this case, no "substantial federal question" was "timely or properly raised" in the proceedings below (Sup. Ct. R. 16.1(b)). This clearly was the perception of four of the five Justices of the state supreme court, who did not even mention the alleged constitutional ramifications of the Commission's decision. See *Fuller* v. *Oregon*, 417 U.S. 40, 50 n.11 (1974) (failure of state court to address alleged constitutional question creates a presumption that the question was not properly raised).

Appellant's attempts (J.S. 9-10; J.S. App. 67a-71a) to find intimations in the record of the presentation of a constitutional question fall woefully short of showing that a constitutional claim was presented "with sufficient definiteness * * * to say that the court's attention was challenged thereto" (*Live Oak Water Users' Ass'n* v. *Railroad Comm'n*, 269 U.S. 354, 357 (1926)). Rather, it is apparent that no constitutional claims were "thoroughly discussed" until they were raised by the dissenting Justice below (J.S. 10 n.6). Indeed, before the dissent suggested otherwise, appellant *conceded* that it had "no complaint that its procedural due process rights have been violated" (Idaho Sup. Ct. Reply Br. 26). For the foregoing reasons, the appeal should be dismissed.

2. Treating the jurisdictional statement as a petition for a writ of certiorari (see 28 U.S.C. 2103),

the petition should be denied. The decision of the Idaho Supreme Court is entirely factbound. As both the majority and dissent below pointed out, the facts of this case are "unique" (J.S. App. 7a, 13a); because of "the peculiarities of the situation" involved (*id.* at 9a), "[t]his is not the ordinary public utilities case" (*id.* at 14a). Moreover, despite appellant's efforts to dress its challenge to the Idaho Supreme Court's construction of state law in constitutional garb, appellant has failed to present an issue that comes close to warranting this Court's review.[7]

a. The starting point in this case is the determination of both tribunals below that IPC's certificate of public convenience and necessity confers upon IPC the right to serve the Department of Energy facility (see J.S. App. 9a, 46a). Appellant contends that these decisions are wrong, that Idaho law actually conferred upon *appellant* a property right to continue to serve the DOE facility, and that the decisions below effect a deprivation of that property right in violation of both procedural and substantive due process protections.

As a threshold matter, the interpretation of IPC's certificate is a question of state law on which the Idaho Supreme Court's decision is dispositive. And while this Court obviously is free to consider for itself whether appellant had a property interest that was affected by the IPC certificate, the state's highest court's interpretation of appellant's interest should not lightly be cast aside. See *Hughes* v. *Washington*, 389 U.S. 290, 296-297 (1967) (Stewart, J.,

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[7] Appellant's failure to raise the constitutional claims properly in the court below also weighs strongly against review under this Court's certiorari jurisdiction.

concurring) (deference to state court determination appropriate unless that determination "worked an unpredictable change in state law"). There is no basis for rejecting the Idaho Supreme Court's conclusion on this record.

Appellant has pointed to nothing in Idaho law that confers upon it the sole right to provide electricity to the DOE facility. Such a property right would presumably be founded upon a provision of state law barring the Commission from granting overlapping certificates of public convenience and necessity, or permitting overlapping certificates in only limited circumstances. But the Commission's governing statute provides that the Commission may "attach to the exercise of the rights granted by [a certificate of public convenience and necessity], such terms and conditions as in its judgment the public convenience and necessity may require." Idaho Code § 61-528 (1976); see also Idaho Code § 61-526 (1976) (authorizing the Commission to act in a manner that is "just and reasonable" in the event of a conflict between two utilities). No mention is made of any requirement to grant exclusive service rights.[8]

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[8] Appellant relies (J.S. 14-15) upon *Cambridge Telephone Co.* v. *Pine Telephone System, Inc.*, 109 Idaho 875, 712 P.2d 576 (1985), in which the Idaho Supreme Court held that a certificate previously issued for an unserved area could be revoked—and authority to serve that area awarded to another utility—if the Commission acted before the first utility began to extend its service to the area in question (109 Idaho at 879 & n.2, 712 P.2d at 580 & n.2). *Cambridge Telephone* is inapposite here because the Commission did not revoke appellant's certificate; it simply held that (1) a certificate could be issued to IPC in respect of the service to DOE *that IPC already was providing*, and (2) where two utilities have authority to serve the same customer, the customer should be

The record of this case makes clear that overlapping authority is not unprecedented: appellant and IPC both have certificates of public convenience and necessity granting general authority for the provision of electric service in four Idaho counties (see J.S. App. 42a-43a). Appellant has failed to show that Idaho law limited the Commission's authority to issue another certificate authorizing service to the DOE facility if it found that the public convenience and necessity supported that action, especially in view of the fact that IPC was already providing the very service authorized by the certificate. There is accordingly no reason to think that the Commission's decision to issue such a certificate to IPC infringed any property right of appellant.

Second, appellant has not shown any basis for disagreement with the Idaho Supreme Court's conclusion that, as between IPC and appellant, IPC has the right to provide service to the DOE facility. The court quite reasonably concluded that where there are "two utilities with valid certificates to deliver energy at transmission voltage, the utility that is currently and satisfactorily serving the disputed area may continue to do so" (J.S. App. 9a).[9]

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served by the utility that is already in fact providing service to the customer.

The other Idaho decisions cited by appellant (J.S. 20) similarly do not announce any rule indicating that these actions were improper in the circumstances of this case. Appellant also cites (J.S. 16-18) a number of decisions by courts of other states dealing with revocation of certificates. Those decisions are irrelevant because the question here is one of Idaho law.

[9] Even if the decisions of the state tribunals infringed upon a property interest created by state law, moreover, the judg-

b. The Commission noted that "the public interest factors weigh heavily in favor of" permitting IPC to serve the DOE facility, because of "the cost to Idaho ratepayers of not allowing Idaho Power to continue to be the sole supplier" (J.S. App. 48a). The Commission did not rest its decision on that ground because IPC's certificate already gave IPC the right to provide that service. However, this potential alternate basis for the Commission's decision in favor of IPC indicates that reversal of the decision below by this Court might not affect the actual outcome of this case.

c. Wholly apart from the merits, appellant has presented no reason why review by this Court is appropriate. As we have discussed, both the majority and dissenting opinions below stress the fact bound nature of appellant's claims. This case involves unusual questions concerning the method of selecting the utility company that is entitled to serve a single large

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ment below might be supported on the ground that there is no constitutional violation. With respect to the claimed violation of procedural due process, appellant does not assert that it did not receive notice of the 1969 proceeding that culminated in the issuance of the IPC certificate of public convenience and necessity, it claims only that that notice was inadequate. Notice of the pendency of the proceeding was indisputably all that the Constitution requires; an interested party need not be informed of all possible consequences of that proceeding in order to receive due process. With respect to the substantive due process claim—the assertion that the Commission's action amounted to a taking—appellant may not have suffered an "interference with reasonable investment-backed expectations" sufficient to amount to a violation of the Fifth Amendment because appellant has not actually supplied any power to DOE since 1978 (*PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980)).

customer where service previously was provided by two utility companies acting in concert. There is no reason for this Court to review the determinations of the state commission and the Idaho Supreme Court.

CONCLUSION

The appeal should be dismissed for want of jurisdiction. Treating the jurisdictional statement as a petition for a writ of certiorari, the petition should be denied.

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No. 86-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UTAH POWER & LIGHT COMPANY,
Appellant

v.

IDAHO PUBLIC UTILITIES COMMISSION,
UNITED STATES DEPARTMENT OF ENERGY, and
IDAHO POWER COMPANY,
Appellees

On Appeal from the Supreme Court of Idaho

APPELLANT'S REPLY TO THE MOTIONS TO DISMISS OF THE DEPARTMENT OF ENERGY, THE IDAHO PUBLIC UTILITIES COMMISSION, AND IDAHO POWER COMPANY

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APPELLANT'S REPLY TO THE MOTIONS TO DISMISS OF THE DEPARTMENT OF ENERGY, THE IDAHO PUBLIC UTILITIES COMMISSION, AND IDAHO POWER COMPANY

Appellant Utah Power & Light Company ("Utah Power") hereby replies to the Motions to Dismiss of appellees Department of Energy (the "DOE"), Idaho Power Company ("Idaho Power"), and Idaho Public Utilities Commission (the "IPUC").

A. The IPUC Order is a "Statute" for Purposes of 28 U.S.C. § 1257(2).

The DOE and IPUC contend that the IPUC's order (the "Order") is not a "statute" under 28 U.S.C. § 1257 (2) because it is not legislative in nature. Said appellees rely upon several cases standing for the proposition that a "statute" for purposes of 28 U.S.C. § 1257(2) must be legislative in nature: *Lathrop v. Donohue*, 367 U.S. 1191 (1961), *King Manufacturing Co. v. City Council of Augusta*, 277 U.S. 100 (1928), and *Prentis v. Atlantic Coastline Co.*, 211 U.S. 210 (1908).

In *Prentis*, this Court held that an act is judicial in nature when there is an investigation, declaration, and enforcement of "liabilities as they stand on present or past facts, and under laws supposed already to exist." *Prentis*, 211 U.S. at 226. Legislation, however, "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Id.* The DOE and IPUC claim that the Order merely declares rights "according to the terms of previously issued certificates [of public convenience and necessity ("Certificate")]" and therefore is not a statute. This analysis is faulty in at least three respects.

First, the Order is more than a mere declaration of rights. It changes previously established rules regarding competition between public utilities involving conflicting Certificates in a manner affecting all future con-

flicts between public utilities. It also extends the rule of *Cambridge Telephone v. Pine Telephone*, 712 P.2d 576 (Idaho 1985), in a way which creates a conflict with decisions of other state courts. *See* J.S., at 16-19.

Second, the Order fits squarely within the *Prentis* legislative test because it "looks to the future and changes existing conditions." *Prentis*, 211 U.S. at 226. The DOE sought a declaratory ruling from the IPUC that Idaho Power had the right *solely* to serve DOE at its Idaho facility. Until issuance of the Order, the DOE continued to receive electricity as it had for the preceding thirty-five years, pursuant to the Three Party Agreement (the "Agreement"). Under the Agreement, Idaho Power electricity was delivered to the DOE over Utah Power facilities and *pursuant to Utah Power's Butte County Certificate.* See J.S., at 5. Until 1969, Utah Power held the sole Butte County Certificate, the point of delivery for power to the DOE facility. Even after Idaho Power received its Certificate in 1969, the DOE continued to receive power through Utah Power's physical facilities and under the Agreement, *pursuant to Utah Power's Butte County Certificate.* There was no change whatsoever in the operation or plan of delivery. The effect of the Order was to change the existing condition under which Idaho Power furnished the DOE with electricity through Utah Power's Certificate and the Agreement.

Finally, appellees' analyses presuppose the validity of the Idaho Power Certificate, which Utah Power challenges. *See infra*, at 6-9. If the Idaho Power Certificate is invalid, the Order is nothing more than a defective grant of authority, in effect, a new Certificate granted without compliance with Idaho statutory requirements for obtaining such Certificate. The IPUC concedes that such an original grant is a legislative act. *See* IPUC Motion to Dismiss, at 4. It follows that a change in an original grant is likewise a legislative act.

The DOE and IPUC incorrectly argue that, because this matter began as a declaratory proceeding and re-

sulted in an order purportedly resolving issues between the parties to this appeal, the Order cannot be legislative.[1] It is elementary law that an administrative order resulting from an adjudicatory or declaratory proceeding can and often does result in the fashioning of a rule. *See, e.g., Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 202-03 (1974); 2 K. Davis *Administrative Law Treatise*, § 7:25 (2d ed. 1979).

None of the cases cited by appellant, *Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Comm'n*, 346 U.S. 359 (1953), *Lake Erie & Western Railroad Co. v. Railroad Comm'n of Indiana*, 249 U.S. 422, 424 (1919), or *Williams v. Bruffy*, 96 U.S. 176, 183 (1878), involved the quintessential legislative-type order—the ratemaking order—such as was considered in *Prentis*. Significantly, however, this Court upheld appellate jurisdiction in each case. Furthermore, both *Atchison* and *Lake Erie* were decided after *Prentis*.

In *Atchison*, the California Public Utilities Commission (the "CPUC") "entered orders authorizing the construction of certain [railroad crossing] grade separation improvements and allocating the costs therefor, pursuant to [statute]," between the subject railroads and the city in which the improvements would be constructed. *Atchison*, 346 U.S. at 347-49. It is clear from the opinion that the CPUC was exercising previously established authority in reaction to an *existing* automobile traffic safety problem, which the order was intended to resolve. Hence, from a jurisdictional perspective, *Atchison* does not differ materially from the matter at hand.

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[1] On page 8 of the DOE Motion to Dismiss, the DOE states that *both* the majority and dissenting opinions "note" that "'[t]his is not the ordinary public utilities case,' but instead resembles a 'contract dispute.'" The statement, however, is properly attributable only to the dissenting opinion, and is taken out of context. Justice Bakes stated that "the majority's decision *could be likened* to settling a . . . contract dispute. However, it is evident that the majority has failed to (1) realize the broader constitutional implications of this case." J.S., at 14a (emphasis added).

Lake Erie concerned the validity of an order of the Illinois Public Utilities Commission (the "Illinois PUC") directing a railroad company to reconstruct a railway spur, which had been used for forty years but was torn up by the railroad company when its user had suffered a fire, which temporarily put the user out of business. The railroad company refused to reconstruct the spur, as it was required to do by statute, claiming a statutory exception that it posed a hazard to its main-line operation. The Illinois Supreme Court stated that the primary issue was whether the railroad company had "improperly removed" the track. *State Public Utilities Comm'n v. Lake Erie & W.R. Co.*, 115 N.E. 519, 522 (1917). Thus, under the rationale of the DOE and the IPUC, the Illinois PUC's order could have been construed merely as a declaration of the railroad company's rights under the statute and hence judicial in nature.

This Court, however, described the *Lake Erie* order in the following manner, in upholding jurisdiction under 28 U.S.C. § 1257(2):

> Such an order, being legislative in its nature and made by an instrumentality of the State, is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction.

Lake Erie, 249 U.S. at 424; *see also Grand Trunk Western Railway Co. v. Railroad Comm'n of Indiana*, 221 U.S. 400 (1911) (this Court held that the order of the state railroad commission directing apportionment of costs to construct a railway crossing "is a legislative act by an instrumentality of the State exercising delegated authority," *id.* at 403); *Wadley Southern Railway Co. v. Georgia*, 235 U.S. 651 (1915) ("administrative orders made by a commission are . . . legislative in nature," *id.* at 660). Just as in *Lake Erie*, the IPUC in this matter reviewed the history of service to the DOE, and relying thereon, and upon a Certificate previously issued to Idaho Power, ordered that Idaho Power was entitled solely to

serve the DOE. From a jurisdictional standpoint, there is no difference between the present case and *Lake Erie.*

B. Appellant Has Properly Raised Substantial Federal Questions.

Utah Power asserted its federal questions in its petition for rehearing to the Idaho Supreme Court. The petition was denied "after due consideration." J.S., at 26a. This Court has previously held that a federal question is properly raised when first broached in a petition for rehearing to the highest court in the state. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 476 (1975).[2]

In addition, Justice Bakes' dissent clearly discussed appellant's federal claims, and this Court has intimated that consideration of federal questions in a dissenting opinion will satisfy Supreme Court Rule 16.1(b) jurisdictional requirements. *See Webb v. Webb,* 451 U.S. 493, 495 (1981).

In its Motion to Dismiss, p. 9, the DOE suggests that, because the majority opinion did not directly discuss appellant's federal questions, appellant did not properly preserve these claims for review by the Idaho Supreme Court. However, appellant properly preserved its federal claims for Idaho Supreme Court review by raising them in its petition for rehearing to the IPUC. *See Idaho Underground Water Users Ass'n v. Idaho Power Co.,* 404 P.2d 859 (Idaho 1965); J.S., at 9-10, 67a.

The DOE's reliance on *Live Oak Water Users' Ass'n v. Railroad Comm'n of the State of California,* 269 U.S. 354 (1926), cited by the DOE at p. 9 of its Motion to Dismiss, is misplaced. Unlike the appellant in *Live Oak,* in both its appellate and rehearing petition briefs to the Idaho Supreme Court, as well as in oral argument, Utah Power raised its federal constitutional claims. J.S., at

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[2] In *Eddings v. Oklahoma,* 455 U.S. 104, 113 n.9 (1982), this Court also noted that a federal question may be properly raised in a petition for rehearing where the petitioned court denies the petition being "fully advised in the premises."

9-10, 68a-71a. It is also undisputed that the majority opinion expressly passed on appellant's federal claims by rejecting the position asserted in the dissenting opinion. J.S., at 10a n.1. Such summary rejection satisfies § 1257 "drawn into question" requirements. *Cox*, 420 U.S. 469, 476 (1975). Hence, it cannot be *reasonably* disputed that appellant's constitutional claims were presented to the Idaho Supreme Court "with sufficient definiteness . . . to say that the court's attention was challenged thereto." *Live Oak*, 269 U.S. at 357.

C. The Idaho Power Certificate Has Been Interpreted to Deprive Appellant of Its Property Without Due Process.

The substantive position asserted by the DOE and Idaho Power for dismissal of this appeal is that there are adequate state grounds to support the decision of the Idaho Supreme Court [3] and that the state court has final authority to interpret the scope of state-issued Certifi-

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[3] Although appellees' substantive arguments are without impact on the determination of the Court's jurisdiction in this matter, inasmuch as they ignore the constitutional problems of denial of due process, such arguments also fail on their merits. In *McFayden v. Public Utilities Consolidated Corp.*, 299 P. 671 (Idaho 1931), the Idaho Supreme Court stated:

> As between two utilities with like ability to furnish like service under our public utility law, the company already serving a given field has a right to preference. . . . It is the purpose of our law to protect that right by the requirement that a newcomer, before entering the field, shall procure a certificate of convenience and necessity to construct and operate a utility in competition. If the new service offered has no advantage over the old from the public viewpoint, other than mere competition under similar basic costs, then the convenience and necessity for it, under the public utility law, would be wanting, and the utility in the field would be entitled to protection against duplication and unwarranted competition.

299 P. at 673. Utah Power held the first Certificate for Butte County and had allowed Idaho Power to provide service pursuant to this Certificate under the Three Party Agreement. Its ability to provide satisfactory service is not disputed.

cates.[4] However, this argument presupposes the validity of the Idaho Power Certificate, which Utah Power challenges on federal constitutional grounds.

The DOE asserts that notice generated by Idaho Power's application (the "Application") for a certificate of authority to construct the AMPS line was all the notice constitutionally required to validate Idaho Power's Butte County Certificate, vis-à-vis appellant, as authority to solely serve the DOE. DOE Motion to Dismiss, at 12-13 n.9. The DOE asserts, without supporting authority, that such notice is "undisputably" satisfactory. The constitutional adequacy of notice for a Certificate to *construct* a power line, interpreted sixteen years later to grant authority to *sell* electricity, is anything but undisputable.

As set forth in *Grindstone Butte Mutual Canal Co. v. Idaho Power Co.*, 574 P.2d 902, 907 (Idaho 1978), "[a]ppurtenant to the right to notice is the right to be fairly notified as to *the issues* to be considered . . . ." *Id.* at 907 (emphasis added). In substance, the Application, set out in Appendix J, J.S., at 76a-81a, gave the following notice: Idaho Power, as part of its contractual responsibilities associated with the AMPS-line project, was to construct a section of the line through Butte County. Having *no* Butte County Certificate, Idaho Power requested the IPUC to grant it a Certificate for Butte County "FOR TRANSMISSION LINE ONLY," with the following limitation:

> That said transmission line . . . *will not be available for, or dedicated to, the furnishing of general*

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[4] As an "alternative basis" in support of its Motion to Dismiss, the DOE asserts that a reversal by this Court of the Idaho Supreme Court opinion would not affect the outcome of this case because the IPUC noted, but did not rely upon, that public interest was a factor weighing in favor of Idaho Power and the DOE. DOE Motion to Dismiss, at 13. This bootstrap analysis relies on nothing more than dicta in the Order, incorrectly assuming that public interest is relevant in determining whether Utah Power was denied due process of law.

> *service along its route, and the construction of this transmission line will not compete with any other public utility, corporation or person.*

Id. at 78a (emphasis added).

It is clear from the foregoing that the notice received by Utah Power was a request by Idaho Power to *construct* a transmission line. Nothing suggests that Idaho Power was requesting authority to *sell* electricity. As noted in the Jurisdictional Statement, pp. 20-21, the infirmities relating to the Idaho Power Certificate are substantial, both in terms of notice and compliance with statutory requisites.

The DOE's assertion that appellant has not suffered a constitutional deprivation because it has not shown that it has an *exclusive* right to service Butte County, and because it still holds a valid Certificate to serve therein, DOE Motion to Dismiss, at 11, ignores the constitutional questions. There is no dispute that providing electric services to the DOE is a valuable property right. Furthermore, exclusivity is an inherent right under Idaho law. As noted in the Jurisdictional Statement, p. 20, the IPUC could not issue a competing Certificate to Idaho Power without proving unsatisfactory service by Utah Power. This is not disputed. It logically follows that a Certificate is exclusive to the extent the Certificate holder provides satisfactory service. It has never been found, nor even suggested, that Utah Power provides anything but satisfactory service.[5] The result of

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[5] Even assuming that Utah Power's Certificate was not exclusive, the DOE's conclusion that the IPUC was therefore authorized to issue overlapping Certificates is without logic or legal support. As stated by the DOE, "Appellant has failed to show that Idaho law limited the [IPUC's] authority to issue another certificate." DOE Motion to Dismiss, at 12. This assertion demonstrates a fundamental misunderstanding of appellant's constitutional claims. Mere authority to act does not shield otherwise lawful actions from constitutional scrutiny. For example, most governmental entities have inherent or statutory authority to take private property for

the IPUC Order, granting Idaho Power the right solely to serve the DOE, deprives Utah Power of this valuable right.[6] The issue raised on appeal to this Court is whether Utah Power was deprived of this property right in contravention of the United States Constitution.

D. Appellees' Certiorari Arguments are Meritless.

In addition to setting forth the basis for appellate jurisdiction, appellant has also raised facts in the Jurisdictional Statement which establish certiorari jurisdiction for this matter in the Court on at least two bases.

First, as demonstrated above, "the validity of a state statute is drawn in question on the ground of its being repugnant to the constitution." 28 U.S.C. § 1257(3). Second, appellant has claimed an infringement of constitutionally protected right, title, and privilege.

Appellant has also suggested reasons justifying the exercise by this Court of its discretionary review pursuant to its certiorari jurisdiction. As demonstrated in the Jurisdictional Statement, pp. 16-18, the Idaho Supreme Court decision herein under review "has decided a federal question [constitutionally protected property rights] in a way in conflict with the decision of another state court of last resort." Supreme Court Rule 17.1(b).

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public purposes by way of condemnation. Although condemnation is fully authorized, the exercise of that authority is subject to constitutional scrutiny, for example, payment of just compensation.

[6] The DOE's assertion that "appellant may not have suffered an 'interference with reasonable investment-backed expectations,'" DOE Motion to Dismiss, at 13 n.9, is without foundation. It is undisputed that Utah Power constructed substantial transmission and substation facilities, in addition to providing electricity as well as standby capacity, to meet the energy needs of the DOE Idaho facility, and that appellant received annual compensation therefor. The result of the IPUC Order clearly and completely interferes with appellant's "reasonable investment-backed expectations," eliminating the economic return associated with its facilities and services.

In addition to conflicting state court decisions, appellant sets out national implications flowing from the Idaho Supreme Court opinion. J.S., at 10-14. No attempt is made by appellees to refute either the conflicting authority or the implications of the decision here under review. Certiorari jurisdiction in this matter is proper and exercise thereof warranted for reasons set forth in the Jurisdictional Statement and this Reply.

DATED this 22nd day of September, 1987.

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